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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should overrule or expressly limit its decision in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1211, 20 L. Ed. 2d 138 (1968), which held that it was unconstitutional to offer a defendant a benefit to plead guilty and waive his right to a jury trial, in order to avoid a possible death sentence, in light of: (a) the significant changes in capital jurisprudence; (b) this Court's subsequent decisions, holding that plea agreements, even in capital cases, are constitutional and a desirable attribute of the criminal justice system; and (c) the New York Court of Appeals exclusive reliance on *Jackson* in striking N.Y. Crim. Proc. Law §§ 220.10(5)(e) and 220.30(3)(b)(vii), which empowered the prosecutor to offer a discretionary non-death penalty plea bargain to a capital defendant.

2. Whether the New York Court of Appeals correctly interpreted *United States v. Jackson* when it struck N.Y. Crim. Proc. Law §§ 220.10(5)(e) and 220.30(3)(b)(vii), which codified a prosecutor's right to negotiate and offer a capital defendant a plea bargain with a non-death sentence either before, during, or after a guilt phase trial, irrespective of whether the defendant chooses to exercise his Fifth and Sixth Amendment rights to a trial on the question of guilt.

LIST OF PARTIES

The Petitioners in this case are:

CHARLES J. HYNES, District Attorney of Kings County, State of New York

HOWARD R. RELIN, District Attorney of Monroe County, State of New York

ELIOT L. SPITZER, Attorney General of the State of New York

The Respondents in this case are:

ALBERT TOMEI, Justice of the Supreme Court of the State of New York, County of Kings

MICHAEL SHANE HALE

JOHN J. CONNELL, Judge of the County Court, Monroe County State of New York

ANGEL MATEO

These cases emanated from the criminal prosecutions of (a) Michael Shane Hale and (b) Angel Mateo, respectively, both of whom had been indicted on charges including first degree murder. In both cases, the District Attorney filed a notice of intent to seek the death penalty pursuant to N.Y. Crim. Proc. Law § 250.40(2). Both Hale and Mateo filed motions requesting that New York's capital punishment law be invalidated as unconstitutional. After Justice Tomei and Judge Connell, respectively, found that certain provisions of New York's Criminal Procedure Law relating to guilty pleas in capital cases were unconstitutional, District Attorney Hynes and District Attorney Relin brought proceedings in the Appellate Division of the Supreme Court of New York to declare the statutory provisions constitutional. Both the Appellate

Division, Second Department and the Appellate Division, Fourth Department, declared the provisions to be constitutional.

After Justice Tomei and Michael Shane Hale appealed to the New York Court of Appeals in the proceeding brought by District Attorney Hynes, and after Judge Connell and Angel Mateo appealed to the New York Court of Appeals in the proceeding brought by District Attorney Relin, the Court of Appeals consolidated the appeals and heard them together. The Attorney General of the State of New York sought and was granted permission to intervene in the matter.

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Charles J. Hynes, as District Attorney of the County of Kings, State of New York, Howard R. Relin, as District Attorney of the County of Monroe, State of New York, and Eliot L. Spitzer, the Attorney General of the State of New York, as intervenor, petition this Court for a writ of *certiorari* to review a decision and judgment of the Court of Appeals for the State of New York, dated December 22, 1998, which declared that provisions of New York State's Criminal Procedure Law regarding guilty pleas in first degree murder cases violated the Fifth and Sixth Amendments to the United States Constitution, because those provisions needlessly penalized the exercise of the right to a jury trial on the issue of guilt and needlessly encouraged the waiver of the right not to plead guilty.

OPINIONS BELOW

The opinion of the New York Court of Appeals in *Matter of Hynes v. Tomei* and *Matter of Relin v. Connell* is reported at 92 N.Y.2d 613 (1998) and is reprinted in the appendix at 1a. The opinion of the Appellate Division, Second Department in *Matter of Hynes v. Tomei* is reported at 237 A.D.2d 52, 666 N.Y.S.2d 687 (2d Dep't 1997) and is reprinted in the appendix at page 20a. The opinion of the Appellate Division, Fourth Department in *Matter of Relin v. Connell* is reported at 674 N.Y.S.2d 192 (4th Dep't 1998) and is reprinted in the appendix at page 34a. The opinion of respondent Justice Albert Tomei in *People v. Hale* is reported at 173 Misc. 2d 140, 661 N.Y.S.2d 457 (N.Y. Sup. Ct., Kings Co. 1997), and the applicable portion thereof is reprinted in the appendix at page 37a. The applicable portion of unpublished opinion of respondent Judge John J. Connell in *People v. Mateo* is reprinted in the appendix at page 54a.

JURISDICTIONAL STATEMENT

The judgment of the New York Court of Appeals was entered on December 22, 1998. This petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

STATUTES INVOLVED

N.Y. Crim. Proc. Law § 220.10. *Plea; kinds of pleas.*

The only kinds of pleas which may be entered to an indictment are those specified in this section:

* * *

5. (e) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

N.Y. Crim. Proc. Law § 220.30. *Plea; plea of guilty to part of indictment; plea covering other indictments.*

> 3. (b)(vii) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

STATEMENT OF THE CASE

Proceedings with Respect to *Hynes v. Tomei*

A. The Criminal Proceeding - *People v. Michael Shane Hale*

On October 14, 1995, in the County of Kings, Borough of Brooklyn, City and State of New York, Michael Shane Hale, being more than eighteen years old, robbed, kidnapped and murdered sixty-four-year-old Stefan Tanner, dismembering his body.

On July 9, 1996, Hale was charged, in Kings County Indictment Number 8776/96, with, *inter alia*, three counts of Murder in the First Degree (N.Y. Penal Law § 125.27[1][a][vii] [McKinney 1998]). On September 24, 1996, the People of the State of New York filed notice, pursuant to N.Y. Crim. Proc. Law § 250.40(2) (McKinney Supp. 1999), of their intention to seek the death penalty (N.Y. Crim. Proc. Law § 400.27 [McKinney Supp. 1999]) in the event Hale was convicted of first degree murder.

B. Pretrial Motions

On January 21, 1997, Hale's attorneys sought an order declaring N.Y. Crim. Proc. Law §§ 220.10(5)(e), 220.30(3)(b)(vii) and 220.60(2)(a) (McKinney Supp. 1999), unconstitutional, and

striking the capital punishment provisions pursuant to *United States v. Jackson*. The People of the State of New York filed papers and memoranda of law in opposition to Hale's motions on March 10, 1997.

C. The Decision of Respondent Justice Albert Tomei

On June 6, 1997, in a portion of a decision and order disposing of Hale's motions, respondent Justice Tomei determined that the aforementioned Criminal Procedure Law provisions violated the Fifth and Sixth Amendments to the United States Constitution, based on *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). Justice Tomei determined that the invalidated provisions were severable from the remainder of New York's capital punishment law (*see* 1995 N.Y. Laws, § 1), and thus, declined to hold the entire capital punishment law unconstitutional. *People v. Hale*, 173 Misc. 2d 140, 177-87, 661 N.Y.S.2d 457, 478-84 (N.Y. Sup. Ct., Kings Co. 1997). (37a-53a).

Accordingly, Justice Tomei refused to accept a guilty plea negotiated by the People and Hale unless the People unconditionally and irrevocably withdrew their notice of intent to seek the death penalty, even though the agreement only required Hale to plead to second degree murder, and not first degree murder.[1]

D. The State Declaratory Judgment Action

On August 5, 1997, petitioner Charles J. Hynes, as District Attorney of Kings County, State of New York, moved in the Appellate Division, Second Department, for a writ of prohibition enjoining Justice Tomei from enforcing that portion of the June 6, 1997 order, adhered to upon reargument on July 23, 1997, which declared the capital guilty plea provisions unconstitutional. In the alternative, District Attorney Hynes moved for a declaratory judgment, pursuant to N.Y. Civ. Prac. L. & R. Article 30 (McKinney 1991), declaring the capital guilty plea provisions constitutional.

---

1. N.Y. Crim. Proc. Law § 250.40(4) (McKinney Supp. 1999) provides that once a notice of intent to seek the death penalty is withdrawn, it cannot be refiled.

In a decision and judgment dated December 22, 1997, the Appellate Division, Second Department converted the proceeding, entitled *Matter of Hynes v. Tomei*, into a declaratory judgment action, and unanimously adjudged the capital guilty plea provisions to be constitutional and valid. *Matter of Hynes v. Tomei*, 237 A.D.2d 52, 666 N.Y.S.2d 687 (2d Dep't 1997) (20a-33a). That court found that the statute at issue in *United States v. Jackson* was distinguishable from the New York statutory provisions in two crucial respects. First, the defendant in *Jackson* faced a unitary trial. Electing to assert the right to a trial on the question of guilt automatically placed the question of death before the jury. The jury could recommend a death sentence without balancing aggravating and mitigating factors. New York's law, by contrast, provided for a bifurcated trial, including a separate sentencing phase at which the jury was required to balance such factors.

Second, the defendant in *Jackson* had complete control of the plea process; he could plead guilty as of right to the charge under the former Federal Kidnapping Act and avoid the death penalty by his unilateral action. The New York statutory provisions did not give capital defendants control over the process. The provisions merely permitted the prosecution to negotiate and enter into a plea agreement with a capital defendant, thereby removing the case from the capital punishment track. *Matter of Hynes v. Tomei*, 237 A.D.2d at 57-58, 666 N.Y.S.2d at 690-91 (27a-30a).

On February 10 and 11, 1998, respondents Justice Tomei and Michael Shane Hale moved respectively for leave to appeal the judgment of the Appellate Division, Second Department, to the New York Court Appeals, and also appealed as of right, on constitutional grounds. On April 7, 1998, the Court of Appeals directed the parties to perfect their appeals taken as of right.

Proceedings with Respect to *Relin v. Connell*

E. The Criminal Proceeding – *People v. Angel Mateo*

On November 2, 1996, in the City of Rochester, County of Monroe, State of New York, Angel Mateo, being more than

eighteen years old, kidnapped and killed Juan Rodriguez-Matos. On December 19, 1996, Mateo was indicted, *inter alia*, on charges of Murder in the First Degree (N.Y. Penal Law § 125.27[1][a][vii] [McKinney 1998]). On January 17, 1997, the People of the State of New York filed notice, pursuant to N.Y. Crim. Proc. Law § 250.40(2) (McKinney Supp. 1999), of their intention to seek the death penalty (N.Y. Crim. Proc. Law § 400.27 [McKinney Supp. 1999]) in the event Mateo was convicted of first degree murder.

F. Pretrial Motions

Mateo's attorneys filed a series of motions which, *inter alia*, sought an order similar to that sought by respondent Hale, declaring N.Y. Crim. Proc. Law §§ 220.10(5)(e), 220.30(3)(b)(vii) and 220.60(2)(a) (McKinney Supp. 1999) unconstitutional. The People of the State of New York filed papers and memoranda of law in opposition to Mateo's motions.

G. The Decision of Respondent Judge John J. Connell

On August 25, 1997, Judge John J. Connell filed a decision and order disposing of Mateo's motions. *See People v. Mateo*, 175 Misc. 2d 192, 664 N.Y.S.2d 981 (N.Y. Co. Ct., Monroe County 1997). An unpublished portion of that decision and order included a determination that the aforementioned Criminal Procedure Law provisions were unconstitutional based on *United States v. Jackson*. Judge Connell reasoned, in part, that plea bargaining in capital cases was inherently unbalanced and, therefore, unconstitutional. Judge Connell determined that the invalidated provisions were severable from the remainder of New York's capital punishment law (*see* 1995 N.Y. Laws, § 1). *See People v. Mateo*, Ind. No. 0914/96, N.Y. Co. Ct., Monroe County, Aug. 25, 1997 (54a-57a).

H. The State Declaratory Judgment Action

On December 24, 1997, petitioner Howard R. Relin, as District Attorney of Monroe County, State of New York, moved in the Appellate Division, Fourth Department, for a writ of prohibition enjoining Judge Connell from enforcing that portion of the August 25, 1997 order which declared the capital guilty plea provisions unconstitutional. In the alternative, District Attorney Relin moved for a declaratory judgment, pursuant to N.Y. Civ. Prac. L. & R. Article 30 (McKinney 1991), declaring the capital guilty plea provisions constitutional.

In a decision and judgment dated June 10, 1998, the Appellate Division, Fourth Department, converted the proceeding, entitled *Matter of Relin v. Connell*, into a declaratory judgment action, and unanimously adjudged the capital guilty plea provisions to be constitutional. *Matter of Relin v. Connell*, __ A.D.2d __, 674 N.Y.S.2d 192 (4th Dep't 1998) (34a-36a). The court determined that the challenged provisions did not needlessly encourage guilty pleas in capital cases because they did not afford capital defendants the unilateral right to plead guilty and thereby avoid the death penalty. __ A.D.2d __, __, 674 N.Y.S.2d at 193 (36a).

On July 7, 10 and 13, 1998, respondents Judge Connell and Angel Mateo moved for leave to appeal the judgment of the Appellate Division, Fourth Department, to the New York Court of Appeals, and also appealed as of right. On August 31, 1998, the Court of Appeals directed the parties to perfect their appeals taken as of right.

The Court of Appeals consolidated the appeals in *Matter of Hynes v. Tomei* and *Matter of Relin v. Connell*. The Attorney General of the State of New York sought and was granted permission to intervene as of right pursuant to N.Y. Executive Law § 71 (McKinney 1993).

I. The Decision of the New York Court of Appeals

The New York Court of Appeals unanimously reversed the judgments of both the Appellate Division, Second Department and the Appellate Division, Fourth Department, and determined that two of the capital guilty plea provisions at issue violated the Fifth and Sixth Amendments of the United States Constitution. *Matter of Hynes v. Tomei*, 92 N.Y.2d 613, __ N.E.2d __, __ N.Y.S.2d __ (1998) (1a-19a).

The Court of Appeals noted that the New York capital punishment statute was distinguishable from the Federal Kidnaping Act at issue in *Jackson*: first, in *Jackson*, a capital defendant had unilateral control over the plea process. The New York capital guilty plea provisions, by contrast, only authorized negotiated bilateral pleas. 92 N.Y.2d at 623-25 (8a-12a). Second, New York's capital statute required a bifurcated trial procedure, by which a jury determined the appropriate sentence in a separate proceeding (*see* N.Y. Crim. Proc. Law § 400.27 [McKinney Supp. 1999]); the defendant in *Jackson* faced a unitary trial. A defendant charged under the statute at issue in *Jackson* automatically placed the issue of capital punishment before the jury by asserting his or her Fifth and Sixth Amendment rights to trial. The Court of Appeals acknowledged that under the bifurcated scheme, a capital defendant could negotiate a plea to a sentence of less than death, even after he or she had been found guilty of first degree murder at a jury trial — after having exercised the Fifth Amendment right not to plead guilty and the Sixth Amendment right to a jury trial on the question of guilt. 92 N.Y.2d at 625-26 (12a-13a).

The Court of Appeals determined, nonetheless, that even in the face of these distinguishing characteristics, the statutory provisions provided for the possibility of a death sentence only after a jury trial, in contravention of the *Jackson* precedent (13a). On this basis, the court held the plea provisions unconstitutional. 92 N.Y.2d at 626. (13a-14a). The Court severed the capital guilty plea provisions from the statute. 92 N.Y.2d at 627-28 (14a-17a).

The Court of Appeals realized that this Court might decide the issue differently, and that the result of its determination would be to "reduce the flexibility of both prosecutors and defendants who wish to plea bargain in capital cases." 92 N.Y.2d at 629 (17a-18a). "[O]ur reversal in these cases may well have an ironic twist in that capital defendants will have fewer opportunities to avoid the possibility of the death penalty." *Id.* (18a). Noting that this Court might wish to reexamine *Jackson's* interpretation of the constitution, the Court of Appeals stated that it was bound by controlling Supreme Court precedent, and that *Jackson* compelled the invalidation of the capital guilty plea provisions. *Id.* (18a).

Finally, the Court of Appeals determined that *Jackson* did not prevent pleas to crimes such as second degree murder, which are not punishable by death, even where a notice of intent to seek the death penalty is pending. *Id.* at 629-30. (18a-19a).

J. Ancillary and Subsequent Proceedings

On December 3, 1998, during the pendency of this case in the New York Court of Appeals, Angel Mateo was found guilty of first degree murder. After a sentencing proceeding, the jury, on December 16, 1998, sentenced Mateo to death. On February 11, 1999, respondent Mateo filed a notice of appeal from the judgment and sentence.

On January 11, 1999, after the decision of the Court of Appeals in *Matter of Hynes v. Tomei*, respondent Hale pleaded guilty to the crimes of Murder in the Second Degree (N.Y. Penal Law § 125.25[2] [McKinney 1998]), and other lesser counts, in exchange for a sentence of fifty years to life. The People's notice of intent to seek the death penalty was not withdrawn. On March 5, 1999, respondent Hale filed a notice of appeal from the judgment of conviction and sentence.

REASONS FOR GRANTING THE WRIT

Because this Court has not revisited the issues underlying *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) since the marked evolution of negotiated plea jurisprudence and capital jurisprudence, with separate guilt and penalty proceedings, a patchwork of inconsistent, irreconcilable and illogical case law has developed, raising questions of great constitutional importance which need to be and can only be resolved by this Court: (1) should *Jackson* be overruled or expressly limited; and (2) if not, is the holding in *Jackson* applicable to bifurcated capital statutes, a question left open by this Court in *Jackson*, or, alternatively, did the New York Court of Appeals misinterpret the scope of the *Jackson* holding and its underlying rationale.

In *Matter of Hynes v. Tomei*, 92 N.Y.2d 613 (1998), the New York Court of Appeals held that unless the plea provisions of a capital statute enable a defendant to plead guilty and obtain a sentence of death, the plea provisions which permit prosecutors to engage in plea negotiations and obtain bargained-for plea agreements to first-degree murder with sentences of life imprisonment without parole or another term of imprisonment are unconstitutional.

The lone justification for this seemingly illogical and unwise result was this Court's decision, 30 years ago, in *United States v. Jackson*. In reaching its decision, the New York Court of Appeals implicitly invited this Court to reconsider and review the *Jackson* issue:

> The Supreme Court has not revisited *Jackson* or its progeny in 20 years and these cases might be decided differently today in light of the increased significance of plea bargaining and substantial changes in the administration of capital punishment.

Matter of Hynes v. Tomei, 92 N.Y.2d at 629. The New York Court of Appeals, however, noted that while this Court may revisit its

interpretation of *Jackson*, the New York Court of Appeals was bound by its own interpretation of that case. *Id.*

Because the issues raised are strictly those of fundamental federal constitutional law, upon which numerous state and federal courts have issued inconsistent opinions, with impractical and incongruous results, this Court should grant the petition for a writ of certiorari.

I.

UNITED STATES v. JACKSON SHOULD BE OVERRULED OR EXPRESSLY LIMITED

In its decision, the New York Court of Appeals observed that a number of events that have transpired since *Jackson* was decided: "the passage of three decades, a plethora of decisions involving the death penalty, and a sea change in plea bargaining . . ." *Matter of Hynes v. Tomei*, 92 N.Y.2d at 620. This observation is accurate, and recognizes an inescapable fact: while *Jackson* has not been formally overruled, and thus the court felt compelled to follow it, it has nevertheless ceased to be a viable precedent. Indeed, the holding of *Jackson* is fundamentally irreconcilable with this Court's post-*Jackson* decisions which have firmly established the propriety of discretionary plea negotiations with capital defendants, and have created a modern capital jurisprudence profoundly different from the state of the law at the time of *Jackson*. Appropriately, courts in other states which have considered the issue have concluded that *Jackson* is obsolete. Accordingly, this Court should grant *certiorari* because *Jackson* should be formally overruled or expressly limited.

As set forth in *Jackson*, the Federal Kidnapping Act (18 U.S.C. § 1201[a], also referred to as "The Lindbergh Law") provided the defendant with a right to enter a plea of guilty; the statute further provided that a defendant who elected a jury trial and was convicted, automatically faced and could receive the death penalty if the jury so recommended; a defendant who elected to plead

guilty or to be tried by the court without a jury could not receive such a penalty. 390 U.S. at 570-71, 88 S. Ct at 1210. The statute was held unconstitutional because

> [t]he inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.

Id., 390 U.S. at 581, 88 S. Ct. at 1216 (note omitted).

Thus, the Court in *Jackson* indicated that it was constitutionally impermissible to offer a capital defendant a reduced sentence in exchange for his or her guilty plea, because the "inevitable" result would be to discourage that defendant from exercising the constitutional right to trial and to remain silent. That proposition is fundamentally inconsistent with the concept of plea negotiation.

At the time *Jackson* was decided in 1968, the disposition of cases by negotiated plea bargains, though legitimate, was nevertheless a hidden component of the criminal justice system. *Jackson* had placed the role of plea bargaining in dire question. Pursuant to that decision, it was constitutionally impermissible to allow a defendant convicted after trial to receive the death penalty, while providing that a defendant who pleaded guilty received a life sentence instead. 390 U.S. at 581-83, 88 S. Ct. at 1216-17.

In *Jackson*, this Court stated that the "evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them." 390 U.S. at 583, 88 S. Ct. at 1217. Thus, it was impermissible for any provision of law to "discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Id.*, 390 U.S. at 581, 88 S. Ct. at 1216. Such a proposition cannot be maintained along with the principle that plea bargaining is a proper attribute of the criminal justice system, and, indeed, this Court's post-*Jackson* decisions demonstrate that the two are irreconcilable.

Shortly after *Jackson*, this Court openly recognized the positive attributes of plea bargaining. Properly-administered plea bargaining is to be "encouraged" as an "essential" and "desirable" "component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260-61, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427 (1971). This Court's "open acknowledgement of this previously clandestine practice" of plea bargaining is a fundamental change from *Jackson*. *Bordenkircher v. Hayes*, 434 U.S. 357, 361-62, 98 S. Ct. 663, 667, 54 L. Ed. 2d 604 (1978).

Indeed, five years after deciding *Jackson*, this Court made a dramatic change away from the position that any statutory format which "discouraged" the exercise of one's trial rights was unconstitutional. In *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), the Court recognized that if a plea bargain is to be accepted by a defendant, it must include something more favorable to the defendant than would be available had he gone to trial. Such an offer must, by its very nature, serve to discourage the defendant from going forward with a trial. *Chaffin* held that such an outcome did not offend the constitution; the constitution does not forbid a situation whereby a defendant is confronted with the "certainty or probability" that, if he goes to trial, he will receive a greater sentence than if he pleaded guilty. In stark contrast to *Jackson*, the *Chaffin* Court concluded that while every such circumstance has a "discouraging effect" on the defendant's assertion of his trial rights, the imposition of these "difficult choices" is an inherent attribute of the process by which plea bargains are tolerated and encouraged. *Chaffin*, 412 U.S. at 30-31, 93 S. Ct. at 1985.

Furthermore, this fundamental shift away from *Jackson* was not an isolated decision. In *Bordenkircher*, the Court held yet again that confronting a defendant with the risk of a more severe punishment should he proceed to trial instead of pleading guilty "may have a 'discouraging effect on the defendant's assertion of his trial rights,' " but such a result is a natural consequence of plea bargaining, and is constitutionally permissible. *Bordenkircher*, 434 U.S. at 364, 98 S. Ct. at 668, citing *Chaffin v. Stynchcombe*, 412 U.S. at 31, 93 S. Ct. at 1985.

In *Corbitt v. New Jersey*, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978), the Court once again adopted a position in favor of plea bargaining that was utterly irreconcilable with *Jackson*. The *Corbitt* Court considered the relationship of the two relevant concepts: the offering of favorable sentencing terms as an inducement to a guilty plea (which means, of course, the defendant is exposed to a higher sentence if convicted after trial), and the resulting disincentive for a defendant to exercise his right to a jury trial. The Court then reaffirmed the principles set forth in *Chaffin* and *Bordenkircher*:

> While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable — and permissible — attribute of any legitimate system which tolerates and encourages the negotiation of pleas. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.

439 U.S. at 220-21, 99 S. Ct. at 498 (citation, quotation marks, and brackets omitted). Thus, in a series of three post-*Jackson* cases, this Court abandoned the notion expressed in *Jackson* that, because a guilty plea structure might have the inherent result of encouraging a guilty plea and discouraging a defendant from going to trial, it was unconstitutional. *See Corbitt*, 439 U.S. at 219, n.9, 99 S. Ct. at 497-98, n. 9.

In *Corbitt*, the Court provided additional proof that *Jackson* had been rejected. In *Jackson*, the challenged statute was criticized because it provided that the defendant who abandoned the right to contest his guilt before a jury and pleaded guilty was assured that he could not be executed, whereas the defendant who exercised his right to a trial suffered the risk of death. 390 U.S. at 581,

88 S. Ct. at 1216. In *Corbitt*, the Court applied an analysis that was diametrically opposed to that in *Jackson*:

> There is no doubt that those homicide defendants who are willing to plead non vult may be treated more leniently than those who go to trial, but withholding the possibility of lenience from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed.

Corbitt, 439 U.S. at 223, 99 S. Ct. at 500.

> The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

439 U.S. at 221, 99 S. Ct. at 498. Furthermore, notwithstanding *Jackson's* language that the disparity of punishment available for a guilty plea and a trial conviction resulted in the needless encouragement of guilty pleas, 390 U.S. at 583, 88 S. Ct. at 1217, *Corbitt* rejected unequivocally any such claim. The Court noted that, just as a prosecutor can charge a defendant with the maximum level of offense and secure a conviction, despite the prosecutor's power to offer a reduced plea, the legislature may also "openly provide for the possibility of leniency in return for a plea." *Corbitt*, 439 U.S. at 224, 99 S. Ct. at 500. The challenged New York statutes do exactly that: they are a legislatively-authorized "leniency in return for a plea."

Corbitt rejected an additional prime component of *Jackson*. While the availability of a guilty plea and reduced disposition to avoid the maximum sentence troubled the Court in *Jackson*, 390 U.S. at 581, 88 S. Ct. at 1216, in *Corbitt*, the Court reached a fundamentally different — and irreconcilable — result. The Court

expressly rejected the viewpoint, represented by the dissent, which "appears to question any system that subjects the defendant who stands trial to a substantial risk of greater punishment than the defendant who pleads guilty." *Corbitt*, 439 U.S. at 224, 99 S. Ct. at 500. In so doing, the Court affirmed the post-*Jackson* principle that the defendant who declines to take advantage of a guilty plea with a reduced sentence and is instead convicted after trial, is not penalized for exercising his or her right to a jury trial, as the defendant was offered a free choice of proceeding to trial or pleading guilty. "Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision." *Id.*, 439 U.S. at 226, 99 S. Ct. at 501.

Thus, the decisions of this Court which followed *Jackson* turned away from its anti-plea bargaining holding, and accepted that plea bargaining is a fundamental component of criminal law. The Court recognized that a plea bargaining system requires the offering of dispositions more favorable than those available should the defendant be convicted after trial. Because the later cases such as *Chaffin*, *Bordenkircher*, and *Corbitt* cannot be reconciled with *Jackson*, the petition for *certiorari* should be granted, and *Jackson* should be overruled, or expressly limited.

II.

EVEN IF *JACKSON* IS NOT OVERRULED, CERTIORARI SHOULD BE GRANTED TO ADDRESS THE QUESTION EXPRESSLY LEFT OPEN IN *JACKSON*: IS *JACKSON* APPLICABLE TO MODERN CAPITAL STATUTES

In *Jackson*, this Court expressly left open the following question: whether a bifurcated capital statute, under which a capital defendant may exercise his or her right to a jury trial on the issue of guilt and still negotiate a plea if convicted, avoids the *Jackson* problem. *Jackson*, 390 U.S. at 573, 578-81, 88 S. Ct. at 1211, 1214-16. Since the *Jackson* ruling, plea jurisprudence and capital jurisprudence have undergone sweeping changes. Plea bargaining, including in capital cases, has become accepted. It is recognized

as an essential tool for the administration of criminal justice. In return for an admission of guilt, a defendant receives a lesser sentence and the proceedings are terminated. In similar fashion, bifurcated capital proceedings, with separate trials, separate evidentiary rules and separate instructions for the determination of guilt and penalty, have become the norm. These constitutional developments, however, collide with both the principles and holding of *Jackson*. Only this Court can resolve the important federal constitutional issues raised which reach core provisions of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The *Jackson* statute contained two critical provisions: (1) a defendant had the unilateral right to plead guilty. By electing this option the defendant automatically avoided the death penalty; and (2) a defendant who elected to exercise his Fifth and Sixth Amendment rights to a trial on the issue of guilt automatically placed the issue of capital punishment before the jury. The proceeding was unitary. There were no separate sentencing trials, no provision for consideration of mitigating and aggravating factors and no instructions to the jury on how to weigh these factors and arrive at a sentencing determination. Thus, a *Jackson* defendant could not elect to proceed with a jury trial on the issue of guilt, yet leave open the possibility of negotiating a sentence less than death. The defendant would live only if the jury voted to spare his life. *Jackson*, 390 U.S. at 581, 88 S. Ct. at 1216. The Court in *Jackson* found that these provisions needlessly encouraged defendants to waive their right not to plead guilty and to elect a jury trial in order to avoid a potential death penalty. *Id.*, 390 U.S. at 581-83, 88 S. Ct. at 1216-17.

Three possible solutions to the problem, short of the draconian remedy of abolishing pleas in capital cases, emerge: (1) create a bifurcated statute allowing for the same latitude in plea agreements either before or after trial on the issue of guilt. Because the defendant has the same right to negotiate a plea either before or after exercising his Fifth Amendment right not to plead guilty and his Sixth Amendment right to a trial on the issue of guilt, the defendant is, seemingly, not needlessly encouraged to waive these

rights nor penalized for exercising them; (2) do not grant defendants the unilateral right to plead guilty in capital cases with a non-death sentence. Only allow pleas pursuant to a negotiated agreement with the prosecution, which may be reached either before or after trial on the issue of guilt. Because a defendant has no automatic right to obtain a non-death sentence by pleading guilty and may obtain a negotiated plea regardless of whether he exercises his Fifth and Sixth Amendment guilt-phase trial rights, *Jackson* concerns should be satisfied; (3) provide for defendants the right to plead guilty and receive a death sentence, as well as a non-death sentence.

The New York statutes adopted two of these measures. New York created a bifurcated proceeding, allowing prosecutors to negotiate pleas in exchange for a non-death sentence regardless of whether the defendant exercised his constitutional rights not to plead guilty and to go to trial on the issue of guilt.[2] New York also denied defendants the unilateral right to plead guilty in a capital case and avoid death. At the same time, in keeping with the New York State constitutional mandate (N.Y. Const., Art. I, § 2), the statute required a jury trial in all capital cases in which a negotiated plea for leniency could not be reached. Two panels of the Appellate Division for the Supreme Court of New York felt that these measures satisfied *Jackson's* concerns. *Matter of Hynes v. Tomei*, 237 A.D.2d 52, 666 N.Y.S.2d 687 (2d Dep't 1997); *Matter of Relin v. Connell*, __ A.D.2d __, 674 N.Y.S.2d 192 (4th Dep't 1998). The Court of Appeals disagreed.

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2. In October 1998, a post-conviction plea agreement occurred. In *People v. Jermaine Page*, Kings County Indictment Number 9833/96, a capital prosecution, the defendant was convicted at the guilt-phase trial of first-degree murder. Prior to the commencement of the penalty-phase proceeding under New York's bifurcated capital system (*see* N.Y. Crim. Proc. Law § 400.27), the defendant agreed to waive the sentencing proceeding and accept a sentence of life imprisonment without the possibility of parole; the People consented to this disposition, by which they agreed to forego the death penalty and accepted a sentence of life imprisonment without parole.

Distilled to its essence, the New York Court of Appeals ruled that absent a provision granting a defendant the right to a "suicide" plea, it is unconstitutional for a capital statute to vest prosecutors with the discretion to negotiate a plea of guilty in exchange for leniency. *Compare Gregg v. Georgia*, 428 U.S. 153, 199, n. 50, 96 S. Ct. 2909, 2937, n. 50, 49 L. Ed. 2d 859 (1976) (prosecutor has "unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them"); *Corbitt*, 439 U.S. at 223, 99 S. Ct. at 499 ("providing the opportunity for lesser punishment . . . could not be deemed a needless or arbitrary burden on the defendant's constitutional rights within the meaning of *United States v. Jackson*").

Having so ruled, the New York Court of Appeals, nonetheless, announced in the next breath that it would be proper for the defendant in a capital case to plead guilty to second-degree murder, a count which does not even expose a defendant to a potential death penalty. *Matter of Hynes v. Tomei*, 92 N.Y.2d at 629 (*Jackson* does not "prevent a defendant from pleading guilty to another offense not punishable by death"). Somehow, the court reasoned, it is unconstitutionally coercive and a needless penalty on a defendant's right to a jury trial to offer him a non-death plea to first-degree murder, but a plea with the very same sentence is constitutionally sound if it is to second-degree murder. Indeed, the irrationality of this position is amplified by examining a triple-homicide case. If the defendant intentionally murdered three people, pursuant to the New York Court of Appeals' ruling, a prosecutor could constitutionally offer that defendant a plea of three consecutive counts of second-degree murder (one for each person killed), a total of seventy-five years to life imprisonment. However, it would be unconstitutionally coercive for the prosecutor to offer twenty-five years to life on each of three counts of first-degree murder (multiple murder counts which would include all three murders in each), which might as a matter of law, run concurrently. (*See* N.Y. Penal Law §§ 70.00[2][a], [3][a][i], 70.25[2], 125.25, 125.27[1][a][viii]).

Indeed, the New York Court of Appeals' ruling holds that it is constitutional for a prosecutor to promise to file a notice of intent

to seek the death penalty unless the defendant pleads guilty to first degree murder and accepts life without parole, but it is impermissible for the prosecutor to file the notice first and then make the same plea offer of life imprisonment without parole. Such distinctions without difference, and inexplicably incongruous results, cannot be what *Jackson* sought to promote.

III.

THE VARIOUS STATE AND FEDERAL COURTS THAT HAVE WRESTLED WITH *JACKSON* AND ITS APPLICATION TO MODERN CAPITAL STATUTES HAVE PRODUCED STARKLY CONFLICTING DECISIONS WHICH CANNOT BE HARMONIZED

The conflict between *Jackson* and this Court's post-*Jackson* cases has led to serious confusion and inconsistent results throughout the country. For example, while the New York Court of Appeals found *Jackson* to be viable, and applied it so as to strike a statutory format that provided for prosecutorial discretion in a capital case, and thereby prohibited guilty pleas to first-degree murder in capital cases, the highest courts in Arkansas and Nevada have reached entirely different results. Indeed, in *State v. Jett*, 419 So.2d 844, 852 (La. 1982), the Louisiana Supreme Court held that a statute just like New York's — which permitted guilty pleas only to sentences less than death and provided for death only after trial — to be constitutional.

Courts in Arkansas and Nevada have both noted the diminished significance of *Jackson*. *See Ruiz & Denton v. State*, 275 Ark. 410, 630 S.W.2d 44, *cert. denied*, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982) (no *Jackson* violation where statute provides that capital defendant could be sentenced to death following a jury trial, but prosecutor, with permission of court, may waive death penalty and defendant could enter a negotiated plea to non-death sentence; "the holding in *Jackson* has been eroded in recent decisions")[3]; *Baker*

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3. The reasoning in *Ruiz & Denton v. State*, 275 Ark. 410, 630 S.W.2d 44, has been upheld by federal courts against a number of *Jackson*-based

(Cont'd)

v. State, 310 Ark. 223, 225, 884 S.W.2d 603, 604 (1994) (Arkansas Supreme Court again stated that "the *Jackson* decision has been eroded" and cited this Court's decision in *Corbitt v. New Jersey*); *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648, 654 (1983), *cert. denied*, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984) ("There is no right to plead guilty, and the fact that only a jury may impose the death penalty does not invalidate [the statute]"); *Conger v. Warden*, 89 Nev. 263, 264, n. 1, 510 P.2d 1359, 1361, n. 1 (1973) ("*United States v. Jackson* appears to have been limited by later decisions"; no *Jackson* violation even though the only mechanism by which defendant can avoid death with certainty is by negotiated plea with prosecutor. "A guilty plea is not compelled and invalid under the Fifth Amendment simply because it is motivated by the defendant's desire to accept the certainty or probability of a lesser penalty than to face a wider range of possibilities extending from acquittal to conviction and a higher penalty"). As these courts have recognized, a defendant who pleads guilty provides a substantial benefit to the criminal justice system, and, in return, the state is entitled to extend a less harsh sentence to the defendant; however, when a plea is rejected, the state may prosecute the defendant to the fullest extent of the law, thereby seeking the most severe punishment provided by the law. *Id. See State v. Mann*, 1996 Tenn. Crim. App. LEXIS 508, 87-90 (Tenn. Crim. App. 1996), *aff'd*, 959 S.W.2d 503, 509-11 (Tenn. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 2376, 141 L. Ed. 2d 2376 (1998). To hold that a state can pursue no greater charge or seek no greater punishment than that offered during plea negotiations could effectively abolish the practice of plea bargaining in first degree murder cases.

(Cont'd)

challenges. *See Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), *aff'd and remanded*, 65 F.3d 676 (8th Cir. 1995) (relying on *Ruiz & Denton v. State*); *Hill v. Lockhart*, 824 F. Supp. 1327 (E.D. Ark. 1993), *aff'd in part and rev'd in part on other grounds*, 28 F.3d 832 (8th Cir. 1994) (same); *Pickens v. Lockhart*, 542 F. Supp. 585, 613 (E.D. Ark. 1982), *remanded*, 714 F.2d 1455 (8th Cir. 1983) ("We adopt the reasoning of the Arkansas Court [in *Ruiz*] that *United States v. Jackson*, on which petitioner relies is distinguishable").

The New York Court of Appeals' attempt to distinguish *Ruiz & Denton v. State*, 275 Ark. 410, 630 S.W.2d 44, illustrates the strained and sophistic arguments that continued reliance upon *Jackson* requires. According to the New York court, Arkansas avoids the "*Jackson* problem" because the court, not the jury, made the final determination of whether or not to impose the death penalty, "and because guilty pleas were permitted only after the prosecutor waived the death penalty [citation omitted]." *Matter of Hynes v. Tomei*, 92 N.Y.2d at 627. This analysis does not bear scrutiny. If the constitutional defect turns on the fact that a more lenient penalty is available upon a guilty plea than under a trial conviction, it cannot matter which entity actually imposes the harsher trial penalty, the court or the jury. Relying upon the trial judge to make a final determination as to sentence cannot be a factor of constitutional significance. Indeed, in *Jackson*, the government had argued that federal trial judges could be relied upon to reject coerced pleas of guilty, and involuntary waivers of trial, thereby curing the defect. This Court soundly rejected that proposition as a remedy. *Jackson*, 390 U.S. at 583, 88 S. Ct. at 1217.

Equally untenable is the New York Court of Appeals' conclusory statement that the prosecutor's waiver of the death penalty preceding the plea somehow rectified the *Jackson* problem. All this provision does is provide for a system by which, in a capital case, the prosecution would, instead of seeking the death penalty, consent to a non-death disposition in return for the defendant's guilty plea. This is precisely the statutory scheme provided for in N.Y. Crim. Proc. Law §§ 220.10(5)(e) and 220.30(3)(b)(vii). Thus, the attempts by the New York Court of Appeals to distinguish the New York statutory provisions from like statutes that have survived *Jackson* challenges are simply wrong.

The New York Court of Appeals is not the only state court to erroneously conclude that *Jackson* forbids the granting of a discretionary benefit to the capital defendant who pleads guilty. In *State v. Johnson*, 134 N.H. 570, 575, 595 A.2d 498, 502 (1991),

cited by the New York Court of Appeals (*Matter of Hynes v. Tomei*, 92 N.Y.2d at 625, n. 5), the Supreme Court of New Hampshire, in response to a *Jackson* challenge to that state's capital statute, found that

> where, pursuant to statutory procedure, the death penalty is imposed upon conviction following a plea of not guilty and a trial, but is not imposed when there is a plea of guilty, that statute is unconstitutional [citation omitted].

See also Commonwealth v. Colon-Cruz, 393 Mass. 150, 470 N.E.2d 116 (1984); *State v. Frampton*, 95 Wash.2d 469, 627 P.2d 922 (1981) (statute which provided for death penalty upon trial conviction but not upon guilty plea violated *Jackson*). Thus, states have analyzed similar capital statutes — which provide for discretionary guilty pleas to non-death sentences as the sole way in which an accused can be assured of avoiding the risk of the death penalty — pursuant to *Jackson* challenges, and reached completely opposite results. Such inconsistent and disparate results regarding fundamental questions of capital jurisprudence should not be left unaddressed by this Court.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari to review the decision and judgment of the Court of Appeals of the State of New York and decide this important constitutional issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF NEW YORK COURT OF APPEALS IN *MATTER OF HYNES v. TOMEI*, 92 N.Y.2d 613, __ N.E.2d __, __ N.Y.S.2d __ (1998)

In the Matter of CHARLES J. HYNES, as District Attorney of Kings County, Respondent, v ALBERT TOMEI, as Justice of the Supreme Court, et al., Appellants.

In the Matter of HOWARD R. RELIN, as Monroe County District Attorney, Respondent, v JOHN J. CONNELL, as Monroe County Court Judge, et al., Appellants, and DENNIS C. VACCO, Attorney-General of the State of New York, Intervenor-Respondent.

Argued October 14, 1998; decided December 22, 1998

* * *

POINTS OF COUNSEL

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* * *

Kevin M. Doyle, Capital Defender, New York City (*Susan H. Salomon* of counsel), for Michael Shane Hale, appellant in the first above-entitled action.

* * *

Charles J. Hynes, District Attorney of Kings County, Brooklyn (*Jonathan Frank* and *Keith Dolan* of counsel), for respondent in the first above-entitled action.

* * *

Appendix A

Dennis C. Vacco, Attorney-General, New York City (*Jill Gross Marks, Edward D. Saslaw* and *Michael Buskus* of counsel), for intervenor-respondent in the first above-entitled action.

* * *

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* * *

Donald M. Thompson, Rochester, for John J. Connell, appellant in the second above-entitled action.

* * *

Office of Capital Defender, Rochester (*Joseph T. Flood* and *William T. Easton* of counsel), for Angel Mateo, appellant in the second above-entitled action.

* * *

Howard R. Relin, District Attorney of Monroe County, Rochester (*Wendy Evans Lehmann* of counsel), for respondent in the second above-entitled action.

* * *

Dennis C. Vacco, Attorney-General, New York City (*Jill Gross Marks, Edward D. Saslaw* and *Michael Buskus* of

counsel), for intervenor-respondent in the second above-entitled action.

* * *

William J. Fitzpatrick, District Attorney of Onondaga County, Syracuse, *Richard A. Brown, District Attorney* of Queens County, Kew Gardens (*Gary Fidel* and *Linda Cantoni* of counsel), and *Bruce Seeliger* for New York State District Attorneys Association, *amicus curiae* in the first and second above-entitled actions.

* * *

OPINION OF THE COURT

Chief Judge KAYE.

Thirty years ago, the United States Supreme Court struck down the death penalty provision of the Federal Kidnaping Act (18 USC § 1201 [a]), which allowed a defendant to be sentenced to death only after a jury trial. The Supreme Court invalidated the provision because, by needlessly encouraging guilty pleas and jury waivers to avoid death sentences, it impermissibly burdened defendants' Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial (*United States v Jackson*, 390 US 570). Despite the passage of three decades, a plethora of decisions involving the death penalty and a sea change in plea bargaining, the Supreme Court has never overruled *Jackson*, which binds this Court. Indeed, every other death penalty State has fit its capital murder plea-bargaining procedures within the rationale of *Jackson*.

Appendix A

Three years ago, the New York State Legislature enacted a capital punishment statute that — like the Federal Kidnaping Act — allows a defendant to be sentenced to death only after a jury trial (L 1995, ch 1). Bench trials are not permitted in capital cases (*see*, NY Const, art I, § 2), and the statute bars imposition of a death sentence upon a guilty plea (*see*, CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]; 220.60 [2] [a]). The New York law thus explicitly provides two levels of penalty for the same offense, imposing death only on those who assert innocence and proceed to trial.[1] Defendants before us now challenge the plea provisions of the New York statute as violative of their Fifth and Sixth Amendment rights, relying on *Jackson*.

Both trial courts held the plea provisions facially unconstitutional under *Jackson* (*People v Hale*, 173 Misc 2d 140; *People v Mateo*, 175 Misc 2d 192). In separate declaratory judgment actions, the Appellate Division of the Second and Fourth Departments subsequently declared the provisions constitutional (*Matter of Hynes v Tomei*, 237 AD2d 52; *Matter of Relin v Connell*, 251 AD2d __, 1998 NY Slip Op 05487). We are convinced that *Jackson* compels the contrary result, and therefore reverse the Appellate Division orders and declare CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) unconstitutional. CPL 220.60 (2) (a), in the absence of the other two challenged provisions, is constitutional. Because the unconstitutional provisions are severable, the remainder of the statute is also unaffected by our ruling.

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1. Significantly, of the 39 death penalty jurisdictions in the United States, only the New York statute provides for such a difference in maximum punishments.

Appendix A

I.

The Federal Kidnaping Act considered in *Jackson* provided:

> "Whoever knowingly transports in interstate * * * commerce, any person who has been unlawfully * * * kidnaped * * * and held for ransom * * * or otherwise * * * shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

Because the Act authorized the death penalty only on the recommendation of a jury, while a defendant convicted of the same offense on a guilty plea or by a Judge escaped the threat of capital punishment, the Supreme Court concluded that the Act "needlessly" encouraged guilty pleas and jury waivers (*United States v Jackson*, *supra*, at 583; *see also*, *Pope v United States*, 392 US 651 [death sentence imposed under the Federal Bank Robbery Act (18 USC § 2113 [e]) vacated for the same reason]). The Court acknowledged that restricting the death penalty to cases in which a jury recommends it is a legitimate goal, and that such a restriction would likely decrease the frequency of capital punishment. However, the Court concluded these considerations did not save the Act from constitutional infirmity. While the Act's chilling effect on a defendant's exercise of the Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial may have been incidental,

the effect was also "unnecessary and therefore excessive," since Congress could have achieved its goals by allowing juries to sentence defendants to the full range of punishments regardless of how guilt was determined (*id.*, at 582-583).

Shortly after *Jackson*, this Court invalidated two provisions of the former Code of Criminal Procedure that required waiver of a jury trial in order to receive the benefit of youthful offender treatment (*see*, *People v Michael A. C.*, 27 NY2d 79). Although respondents who refused to waive a jury trial were not subject to the death penalty, they were exposed to longer prison sentences than those prosecuted as youthful offenders. Drawing a parallel to *Jackson*, this Court held that "a procedure which offers an individual a reward for waiving a fundamental constitutional right, or imposes a harsher penalty for asserting it, may not be sustained" (*id.*, at 86).[2]

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2. Respondents' reliance on *People v Sher* (24 NY2d 454, *mot to amend remittitur granted* 24 NY2d 1031, *cert denied* 396 US 837), a case decided before *Michael A. C.*, is misplaced. Defendant in *Sher* was not subject to the death penalty at the time of his appeal. On June 1, 1965, Governor Rockefeller announced that he would grant executive clemency to all death row inmates, such as Sher, who would not be subject to capital punishment under the revised death penalty statute, and commute their sentences to life imprisonment (*see*, *People v Sher*, *supra*, 24 NY2d, at 456, n, citing press release of June 1, 1965 by Governor Rockefeller at the time of approval of L 1965, ch 1030, § 125.30). Thus, Sher was subject to the same maximum sentence after a jury trial — life imprisonment — as he would have been had he pleaded guilty.

Appendix A

II

New York's death penalty statute authorizes a District Attorney to file a notice of intent to seek the death penalty against a defendant charged with murder in the first degree (*see*, Penal Law § 125.27; CPL 250.40). Upon conviction by a jury, a capital defendant faces a separate sentencing proceeding before a jury to determine whether the penalty imposed will be death or life imprisonment without parole (*see*, CPL 400.27). The statute affords a defendant the opportunity to ensure a maximum sentence of life without parole by pleading guilty pursuant to the following provisions:

> "A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole" (CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]).

> "A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter: (a) a plea of guilty to part of the indictment pursuant to subdivision three or four

> but subject to the limitation in subdivision five of section 220.10" (CPL 220.60 [2] [a]).

For all other crimes in New York only one top sentence is prescribed by statute.

Thus, like the invalidated Federal Kidnaping Act provision, New York's death penalty statute explicitly provides for the imposition of the death penalty only upon a jury verdict. As a result, under the New York statute, only those defendants who exercise the Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial put themselves at risk of death. Nevertheless, respondents argue that the New York statute is distinguishable from the Federal Kidnaping Act in several ways. We conclude that the distinctions are without a constitutionally cognizable difference.

First, under the challenged New York provisions, a defendant can plead guilty to first degree murder, with agreement on the sentence to be imposed, only with the permission of the court and consent of the People (*see*, CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]). Because a defendant does not have unilateral control of the plea process, respondents argue, the statute never gives a defendant the choice between facing a jury and risking death on the one hand, and pleading guilty and avoiding death on the other. Therefore, respondents urge, the statute cannot "needlessly" encourage guilty pleas.

The Supreme Court, however, has found approval of a trial court and a prosecutor irrelevant to the *Jackson* analysis. Defendants prosecuted under the Federal Kidnaping Act could

not enter a plea of guilty as of right, since Federal Trial Judges had discretion to reject guilty pleas and jury trial waivers. This judicial involvement did not cure the constitutional problem: the statute's infirmity was not coercion of guilty pleas and jury waivers but needless encouragement of them (*United States v Jackson*, *supra*, at 583). Even though not every guilty plea to a charge under the Act was necessarily involuntary, the statute still impermissibly burdened defendants' constitutional rights (*id.*).[3]

The Supreme Court's subsequent application of *Jackson* further demonstrates that the People's involvement in the plea process fails to distinguish away *Jackson*'s prevailing rationale. Three years after *Jackson*, the Supreme Court declared unconstitutional North Carolina's capital pleading scheme, which required the approval of both the prosecutor and the court for a defendant to plead guilty. Under the challenged North Carolina statute, if a defendant charged with capital murder tendered a signed plea of guilty, the prosecutor, with the court's approval, could accept or reject the plea. If the plea were rejected, the trial would "proceed upon a plea of not guilty and the tender of the plea of guilty would have

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3. In the years following *Jackson*, the Supreme Court made clear that *Jackson* did not establish a new test for determining the validity of guilty pleas, but rather prohibited the Federal Kidnaping Act's impermissible burden on a defendant's exercise of constitutional rights. The Court also held that an otherwise valid plea is not necessarily involuntary if induced by the defendant's fear of the death penalty, and it refused to vacate guilty pleas simply because they were agreed to pursuant to statutes subsequently invalidated by *Jackson* (*see*, *Brady v United States*, 397 US 742; *North Carolina v Alford*, 400 US 25; *Parker v North Carolina*, 397 US 790).

no legal significance," exposing the defendant to the death penalty (*State v Atkinson*, 275 NC 288, 317, 167 SE2d 241, 259, *revd* 403 US 948). By contrast, if the plea were accepted, the effect would be a sentence of life imprisonment. In June 1971, *after* it had decided *Brady*, *Alford* and *Parker*, the Supreme Court reversed five death sentences imposed under this statute, in a summary disposition that, without explanation, simply cited *Jackson*:

"Judgments, insofar as they impose the death sentence, reversed, *United States* v. *Jackson*, 390 U.S. 570 (1968), *Pope* v. *United States*, 392 U.S. 651 (1968), and cases remanded for further proceedings" (*Atkinson v North Carolina*, 403 US 948; *Roseboro v North Carolina*, 403 US 948; *Hill v North Carolina*, 403 US 948; *Williams v North Carolina*, 403 US 948; *Sanders v North Carolina*, 403 US 948).

Thus, the need to obtain approval from the People and the court will not save plea provisions that otherwise violate *Jackson* (*see also*, *People v Michael A. C.*, 27 NY2d 79, *supra* [Code of Criminal Procedure provisions unconstitutional on *Jackson* grounds, even though court approval was required, with or without the recommendation of the Grand Jury or District Attorney]).[4]

Second, respondents argue that the challenged New York provisions are distinguishable from the Federal Kidnaping

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4. The Nevada Supreme Court, in striking Nevada's death penalty, also concluded that the approval of both the State and the court could not save an otherwise unconstitutional capital pleading scheme (*Spillers v State*, 84 Nev 23, 436 P2d 18, *overruled on other grounds Bean v State*, 86 Nev 80, 465 P2d 133).

Act because they merely codify permissible plea bargaining, which was not at issue in *Jackson*. Subsequent to *Jackson*, both the Supreme Court and this Court have acknowledged the legitimacy and desirability — indeed, the necessity — of plea bargaining (*see*, *Santobello v New York*, 404 US 257; *People v Selikoff*, 35 NY2d 227, *cert denied* 419 US 1122). Plea bargaining serves important functions for both prosecutors and defendants, such as individualized justice, leniency and economy (*State v Forcella*, 52 NJ 263, 245 A2d 181, *revd in part sub nom. Funicello v New Jersey*, 403 US 948). A State clearly may encourage guilty pleas by offering benefits to defendants in return for a guilty plea (*Corbitt v New Jersey*, 439 US 212, 219). Furthermore, plea bargaining becomes no less lawful or desirable when it is codified in statutory form (*see*, *id.*, at 224, n 14).

While plea bargaining is permissible, the Supreme Court in *Jackson* prohibited statutes that "needlessly" encourage guilty pleas, which are not constitutionally protected, by impermissibly burdening constitutional rights. Given the availability of alternatives that do not impermissibly burden defendants' constitutional rights, the plea provisions of the statute before us "cannot be justified by [an] ostensible purpose" such as the facilitation of plea bargaining (*United States v Jackson*, *supra*, at 582-583).

Respondents rely heavily on *Corbitt*, in which the Supreme Court held that it is constitutionally permissible to offer a defendant the possibility of escaping the most severe penalty by pleading guilty (*see*, *Corbitt v New Jersey*, *supra*, at 217-219). The New Jersey statute at issue in *Corbitt*, however, provided for the same maximum sentence — life

imprisonment — regardless of a defendant's plea. While a lesser sentence was permitted for those defendants who pleaded guilty, it was not guaranteed. Thus, the statute survived constitutional scrutiny because it did "not reserve the maximum punishment for murder for those who insist on a jury trial" (*id.*, at 217). This situation is readily distinguishable from the challenged New York provisions, which indeed prescribe a lesser agreed-upon sentence for those who plead guilty. In the words of *Jackson*, "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die" (*United States v Jackson*, *supra*, at 581; *see*, *Corbitt v New Jersey*, *supra*, at 217).[5]

Finally, respondents point to the bifurcated capital trial procedure in New York, by which a jury that finds a defendant guilty determines the sentence in a separate proceeding (*see*, CPL 400.27). By contrast, a defendant prosecuted under the Federal Kidnaping Act faced a unitary trial. Respondents suggest that under the bifurcated scheme, a defendant may

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5. While the Supreme Court has never overruled *Jackson*, it has not since *Corbitt* (decided in the quite different world of 1978) made reference to *Jackson*'s "needless" encouragement of guilty pleas in any majority opinion. As discussed below, however, the *Jackson* rationale continues to have controlling significance in the State courts. Several State courts during the past two decades have explicitly relied on *Jackson* in declaring provisions of their States' death penalty statutes unconstitutional on this ground, most recently New Hampshire in 1991 (*see*, *State v Johnson*, 134 NH 570, 595 A2d 498).

have an opportunity to agree to a sentence after the guilt phase of the trial, and thus after exercising the rights to maintain innocence and to have a jury determine guilt.

This does not alleviate the *Jackson* problem, however, because bifurcation does not eliminate the statutory framework that allows the possibility of death only after a jury trial. Capital defendants under the New York statute who are awaiting trial and are offered a plea are still faced with the choice *Jackson* declared unconstitutional: exercise Fifth and Sixth Amendment rights and risk death, or abandon those rights and avoid the possibility of death. Furthermore, as respondents forcefully assert in trying to distinguish the challenged provisions from the Federal Kidnaping Act, a prosecutor is not required to accept a defendant's guilty plea. In fact, a prosecutor may be less willing to forego pursuit of the death penalty after a defendant's guilt has been established beyond a reasonable doubt. Thus, before deciding whether to proceed to trial, a defendant cannot know whether a deal on the sentence to be imposed will be available after a guilty verdict and before sentencing, and bifurcation does not eliminate the "chilling effect" on a defendant's constitutional rights to maintain innocence and demand a jury trial (*United States v Jackson*, *supra*, at 582).

In sum, respondents' attempts to distinguish New York's death penalty statute from the death penalty invalidated by the Supreme Court in *Jackson* fail. We recognize that New York's death penalty statute carries a strong presumption of constitutionality, as do all statutes (*see*, *People v Davis*, 43 NY2d 17, 30, *cert denied* 435 US 998, *rearg dismissed* 61 NY2d 670). However, the New York provisions are

unconstitutional for the same reason as the Federal Kidnaping Act: by statutory mandate, the death penalty hangs over only those who exercise their constitutional rights to maintain innocence and demand a jury trial. Thus, *Jackson* compels us to invalidate these provisions, just as it has compelled other State high courts to invalidate their capital plea provisions with the same constitutional infirmity (*see, e.g., State v Johnson*, 134 NH 570, 595 A2d 498 [1991], *supra; Commonwealth v Colon-Cruz*, 393 Mass 150, 470 NE2d 116 [1984]; *State v Frampton*, 95 Wash 2d 469, 627 P2d 922 [1981]; *State v Funicello*, 60 NJ 60, 286 A2d 55 [1972], *cert denied sub nom. New Jersey v Presha*, 408 US 942; *see also, Spillers v State*, 84 Nev 23, 436 P2d 18 [1968], *supra* [decided prior to the Supreme Court's decision in *Jackson*]).

By contrast, the death penalty statutes of States that have rejected a *Jackson* challenge, with one exception, provide for the possibility of a death sentence upon a guilty plea (*see, e.g., State v Mann*, 1996 WL 465764, 1996 Tenn Crim App LEXIS 508, *affd* 959 SW2d 503, *cert denied* __ U.S. __, 118 S Ct 2376; *Conger v Warden*, 89 Nev 263, 510 P2d 1359). The exception, Arkansas, avoided a *Jackson* problem because the Trial Judge, not the jury, made the final determination of whether the death penalty would be imposed, and because guilty pleas were permitted only after the prosecutor waived the death penalty (*see, e.g., Ruiz v State*, 275 Ark 410, 630 SW2d 44, *cert denied* 459 US 882).

III.

The question remains whether the entire death penalty statute must be invalidated, as defendants urge, or whether

the challenged provisions may be severed, leaving the statute otherwise operational. The answer depends on whether "the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether" (*People ex rel. Alpha Portland Cement Co. v Knapp*, 230 NY 48, 60 [Cardozo, J.], *rearg denied* 231 NY 516, *cert denied sub nom. State Tax Commr. v People ex rel. Alpha Portland Cement Co.*, 256 US 702). If removing particular provisions while leaving the remainder intact would result in a law the Legislature would not have intended, the entire statute must be stricken (*see, e.g., Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation*, 75 NY2d 88, 94).

In arguing that the death penalty itself should be stricken, defendants seek support from *Jackson*, in which the Supreme Court struck the death penalty from the Federal Kidnaping Act. In that statute, it was the death penalty provision itself, which was added two years after enactment of the original statute, that caused the constitutional infirmity. When enacted in 1932, the Federal Kidnaping Act did not provide for capital punishment; it merely defined the Federal crime of kidnaping and set the punishment as imprisonment for a term of years, to be decided by the trial court (*see*, 47 US Stat 326). Regardless of how a defendant was convicted under the original Act, the potential penalties were the same.

The Act was amended in 1934, however, to change the penalty structure, providing for the imposition of the death penalty only on a jury recommendation, but a prison term otherwise (*see*, 48 US Stat 781). It was the addition of the death penalty in this manner, which resulted in different levels

of punishment depending on whether defendants exercised their constitutional rights, that rendered the statute unconstitutional. Therefore, it was only through excision of the Act's death penalty clause that the constitutional infirmity could be cured. The result was the same sentencing system as the one contained in the original Act — those convicted would be sentenced by the court to imprisonment for a term of years. At the same time, by removing only the death penalty clause, the Court was able to preserve the purpose of the Act — to make interstate kidnaping a Federal crime.

In contrast to the Federal Kidnaping Act, it is clear from the face of the statute before us that the very purpose of the Legislature and Governor in enacting the statute was to provide for capital punishment in New York. The statute's severability clause indicates that the lawmakers would not have wanted the entire statute to fail if the particular provisions regarding pleas were declared unconstitutional:

> "If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, part or provision thereof" (L 1995, ch 1, § 37).

Nor is invalidation of the death penalty necessary to obviate the *Jackson* problem: excision of the capital pleading provisions eliminates the burden on constitutional rights prohibited by *Jackson*, since without those provisions there

is only one maximum penalty for first degree murder. Furthermore, the plea provisions are discrete, and by no means vital to the remainder of the statute. Their removal would not affect the classification of capital offenses, or the conduct of the trial or penalty phase of capital cases.

Finally, while CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) relate exclusively to pleas in first degree murder cases and "needlessly" encourage guilty pleas in violation of *Jackson*, CPL 220.60 (2) (a) is not limited to first degree murder cases,[6] nor does it, in the absence of CPL 220.10 (5) (e), violate *Jackson*. Therefore, only CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) must be stricken.[7] Under the resulting statute, a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending.

We realize this result will reduce the flexibility of both prosecutors and defendants who wish to plea bargain in capital

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6. By its terms, CPL 220.60 (2) (a) allows defendants who have pleaded not guilty to any indictment to withdraw the plea before a verdict, subject to certain limitations, including the limitations of CPL 220.10 (5). Thus, CPL 220.60 (2) (a) affects many cases unrelated to first degree murder.

7. While there is nothing objectionable in the portion of the two unconstitutional provisions that merely allows a defendant to plead guilty to first degree murder with the permission of the court and consent of the People, saving this portion of the provisions would not eliminate the *Jackson* problem. Since by statute only a jury can impose a death sentence and there is no procedure for impaneling a jury to sentence a defendant after a guilty plea (*see*, CPL 400.27), defendants could still avoid the possibility of death only by pleading guilty.

cases. Indeed, our reversal in these cases may well have an ironic twist in that capital defendants will have fewer opportunities to avoid the possibility of the death penalty. We are also aware that the Supreme Court has not revisited *Jackson* and its progeny in 20 years, and that these cases might be decided differently today in light of the increased significance of plea bargaining and substantial changes in the administration of capital punishment. The fact remains, however, that although the Supreme Court itself may revisit its interpretation of Federal constitutional provisions, State courts are bound under the Federal Constitution to follow controlling Supreme Court precedent, and *Jackson* compels the result here.

While reducing the flexibility of plea bargaining in capital cases, excision of the unconstitutional provisions does not prevent pleas of guilty to first degree murder when no notice of intent to seek the death penalty is pending, since defendants in that situation face the same maximum sentence regardless of how they are convicted. Nor does the resulting statute prevent a defendant from pleading guilty to another offense not punishable by death, even when a notice of intent to seek the death penalty is pending, since nothing in *Jackson* prohibits imposing different penalties for different crimes. As the Supreme Court made clear in upholding the plea of a defendant charged with first degree murder who pleaded guilty to second degree murder, a State "may prohibit the practice of accepting pleas to lesser included offenses under any circumstances," but "this is not the mandate of the Fourteenth Amendment and the Bill of Rights" (*North Carolina v Alford*, 400 US, at 39). (*See also*, *State v Johnson*, 134 NH 570, 575, 595 A2d 498, 501, *supra* ["It is well settled

that a statute cannot permit a defendant who insists upon a jury trial and is convicted of capital murder to be sentenced to death, while allowing a defendant who pleads guilty to *the same crime* to escape the possibility of such a sentence" (emphasis supplied)].) Thus, while a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending, plea bargaining to lesser offenses even when a notice of intent is pending, or to first degree murder in the absence of a notice of intent, remains unaffected.

Given our conclusion under the Federal Constitution, we do not reach appellants' arguments under the New York State Constitution. We agree with the Appellate Division that appellants' procedural contentions in *Matter of Relin* are without merit.

Accordingly, in each case, the order of the Appellate Division should be reversed, without costs, and judgment granted declaring that CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) are unconstitutional and are deemed severed and stricken.

Judges BELLACOSA, SMITH, LEVINE, CIPARICK and WESLEY concur.

In each case: Order reversed, etc.

APPENDIX B — DECISION OF APPELLATE DIVISION, SECOND DEPARTMENT IN *MATTER OF HYNES v. TOMEI*, 237 A.D.2d 52, 666 N.Y.S.2d 687 (2d Dep't 1997)

In the Matter of CHARLES J. HYNES, as District Attorney of Kings County, Petitioner, v ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, et al., Respondents.

Second Department, December 22, 1997

* * *

APPEARANCES OF COUNSEL

Charles J. Hynes, District Attorney of Kings County, Brooklyn (*Deborah Stevens Modica, Keith Dolan, Jonathan Frank, Howard Getzler, Jacqueline Linares, Philip Semprevivo* and *Marie-Claude Wrenn* of counsel), petitioner *pro se*.

Hancock & Estabrook, L. L. P., Syracuse (*Stewart F. Hancock, Jr.*, of counsel), for Albert Tomei, respondent.

Capital Defender's Office, New York City (*Kelley Sharkey, John Youngblood* and *Sonya Zoghlin* of counsel), for Michael Shane Hale, respondent.

Christopher Dunn, Norman Siegel and *Arthur N. Eisenberg*, New York City, for New York Civil Liberties Union, *amicus curiae*.

Appendix B

Richard A. Brown, District Attorney of Queens County, Kew Gardens (*Gary Fidel, Linda Cantoni, Bruce Seeliger* and *Kathleen B. Hogan* of counsel), for New York State District Attorneys' Association, *amicus curiae*.

OPINION OF THE COURT

MANGANO, P.J.

In New York, the death sentence may be imposed upon a defendant charged with murder in the first degree only after successive, unanimous jury verdicts are rendered on the issues of guilt and punishment. Various provisions of New York's Criminal Procedure Law (hereinafter CPL) enable a defendant so charged to avoid any possibility of a death sentence by entering into a plea bargain agreement with the People. The question to be answered in this proceeding is whether these plea bargain provisions unconstitutionally penalize a capital defendant's right to a jury trial. We hold that this question must be answered in the negative and that the challenged provisions, CPL 220.10 (5) (e); 220.30 (3) (b) (vii); and 220.60 (2) (a), are constitutional.

I

The respondent Michael Shane Hale was charged under Kings County indictment No. 8776/96 with the crimes of murder in the first degree (three counts), murder in the second degree (four counts), robbery in the first degree, kidnapping in the first degree, and kidnapping in the second degree. These charges arose out of the murder of Stefan Tanner on October 14, 1995. Subsequent to Hale's arraignment on the

indictment, the People timely filed a "notice of intent to seek the death penalty" (hereinafter the notice of intent), should Hale be convicted after a jury trial of the crime of murder in the first degree (CPL 250.40, 400.27).

Thereafter, Hale moved, *inter alia,* for an order declaring that CPL 220.10 (5) (e); 220.30 (3) (b) (vii); and 220.60 (2) (a) (hereinafter the plea bargain provisions) are unconstitutional on their face. As characterized by the respondent Albert Tomei, a Justice of the Supreme Court, Hale argued that the plea bargain provisions, which enable a defendant charged with the capital crime of murder in the first degree to avoid any possibility of a death sentence by entering into a plea bargain agreement with the People, "effectively penalize[d] his right to a jury trial", by exposing him to the risk of death only when he exercised that right (*People v Hale,* 173 Misc 2d 140, 178).

By order entered July 2, 1997, Justice Tomei granted Hale's motion and, in reliance on the 1968 decision of the United States Supreme Court in *United States v Jackson* (390 US 570), held that the plea bargain provisions were unconstitutional in that they did "not conform to the requirements of the Fifth and Sixth Amendments to the United States Constitution, and corresponding provisions of the New York Constitution" (173 Misc 2d, *supra,* at 185).

The People moved to reargue Justice Tomei's order. On July 18, 1997, while the motion to reargue was *sub judice,* Hale and the People reached a plea bargain agreement based on discussions that had been ongoing during the pendency of the criminal action. The plea bargain agreement provided that

Hale would plead guilty, with the People's consent, to murder in the second degree, kidnapping in the second degree, and robbery in the first degree, in exchange for a sentence of 50 years to life imprisonment.

By order entered July 24, 1997, Justice Tomei denied the People's motion to reargue the prior motion which resulted in the order entered July 2, 1997. On that same date, Justice Tomei advised both Hale and the People that, in accordance with his orders, he would not accept their plea bargain agreement unless the People first withdrew their notice of intent.[1]

On August 5, 1997, the People commenced this proceeding pursuant to CPLR article 78 seeking to prohibit Justice Tomei from enforcing so much of his orders as "declared unconstitutional Criminal Procedure Law §§ 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a) * * * or, in the alternative, [for] a judgment * * * declaring Criminal Procedure Law §§ 220.10 (5) (e), 220.30 (3) (b)

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1. CPL 250.40 (4) provides that "A notice of intent to seek the death penalty may be withdrawn at any time by a written notice of withdrawal filed with the court and served upon the defendant. Once withdrawn the notice of intent to seek the death penalty may not be refiled". The People refused Justice Tomei's suggestion that they withdraw the notice of intent, since they were of the view that once the notice of intent was withdrawn, the defendant would inevitably choose to withdraw from the plea bargain negotiations and proceed to trial where he would no longer be subject to the possibility of the death sentence. The People have advised this Court that defendants in two other capital cases (*see, People v Whitehurst,* 167 Misc 2d 383; *People v Hodges,* 172 Misc 2d 112) pleaded guilty with the People's consent after the People had filed their notice of intent.

(vii), and 220.60 (2) (a) to be constitutional and valid in all respects".

II

It is well settled that "[b]ecause of its extraordinary nature, prohibition is available only where there is a clear legal right, and then only when a court — in cases where judicial authority is challenged — acts or threatens to act without jurisdiction or in excess of its authorized powers" (*Matter of Holtzman v Goldman,* 71 NY2d 564, 569; *see also, Matter of Kaplan v Tomei,* 224 AD2d 530). Furthermore, prohibition is not a proper method to determine the constitutionality of a statute (*see, e.g., Matter of Gold v Gartenstein,* 54 NY2d 627). Accordingly, so much of the People's petition as sought a writ of prohibition is denied. However, the People's alternative request, i.e., that the proceeding be converted into an action for a declaratory judgment, requires separate scrutiny.

The remedy of a declaratory judgment " 'is available in cases "where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" ' " (*Matter of Morgenthau v Erlbaum,* 59 NY2d 143, 150, *cert denied* 464 US 993, quoting *New York Foreign Trade Zone Operators v State Liq. Auth.,* 285 NY 272, 276, quoting *Dun & Bradstreet v City of New York,* 276 NY 198, 206). Further, a declaratory judgment may be used to attack a criminal court's interlocutory ruling when "the * * * ruling [has] an obvious effect extending far beyond the matter pending before it so that it is likely that the issue will arise again with the same result in other cases" (*Matter*

of Morgenthau v Erlbaum, supra, at 152). Pursuant to these guidelines and the circumstances presented in the instant proceeding, we deem it appropriate to grant the People's request to convert the proceeding into an action for a declaratory judgment (*see,* CPLR 103 [c]; *see also, Matter of Morgenthau v Roberts,* 65 NY2d 749; *Matter of Penny Lane/ E. Hampton v County of Suffolk,* 191 AD2d 19).

III

With respect to the merits of the instant action, we commence our analysis with the well-settled axiom that "State statutes under scrutiny carry with them a strong presumption of constitutionality, that they will be stricken as unconstitutional only as a last resort and that courts may not substitute their judgment for that of the Legislature as to the wisdom and expediency of the legislation" (*People v Davis,* 43 NY2d 17, 30, *cert denied* 435 US 998).

We now turn to the plea bargain provisions which were declared unconstitutional by Justice Tomei. These provisions were adopted by chapter 1 of the Laws of 1995 and became effective September 1, 1995.

CPL 220.10 (5) (e), governing kinds of pleas, and CPL 220.30 (3) (b) (vii), governing pleas to part of an indictment or covering other indictments, are worded identically, stating: "A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either

life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole".

CPL 220.60 (2), governing change of a plea states in relevant part: "A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter: (a) a plea of guilty to part of the indictment pursuant to subdivision three or four but subject to the limitation in subdivision five of section 220.10".

In making a declaration of unconstitutionality, Justice Tomei relied primarily on the United States Supreme Court's decision in *United States v Jackson* (390 US 570, *supra* [hereinafter *Jackson*]). In *Jackson* the defendants moved to dismiss a count of an indictment charging them with a violation of the Federal Kidnaping Act (18 USC § 1201 [a]). That statute provided for the possibility of the death penalty on the recommendation of the jury but "sets forth no procedure for imposing the death penalty upon a defendant who * * * pleads guilty" (*United States v Jackson, supra,* at 571). Moreover, in *Jackson* the consent of the prosecutor was not required in order to enter a guilty plea to the kidnapping charge. The District Court held that the death penalty provision of the statute was unconstitutional because it made the risk of death the price for asserting the right to a jury trial. In affirming the District Court, a majority of the United States Supreme Court (Justices White and Black dissenting) held that the "inevitable effect" of the statute was "to discourage assertion of the Fifth Amendment right not to

plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial", and that the "evil in the federal statute is * * * that it needlessly encourages [guilty pleas]" (*United States v Jackson, supra,* at 581, 583 [emphasis omitted]).

The Federal Kidnaping Act invalidated in *Jackson* is distinguishable from New York's death penalty statute in two crucial respects. In *Jackson* the defendant faced a unitary trial where the jury could recommend a death sentence and was not required to balance aggravating and mitigating factors.[2] In contrast to the Federal Kidnaping Act, the death penalty statute in New York provides for a bifurcated trial where the defendant's guilt, and the sentence to be imposed, are determined separately by the jury. At the guilt phase, the defendant retains all of his or her constitutional protections, e.g., he or she is not compelled to take the witness stand, and the People must prove guilt beyond a reasonable doubt. At the sentencing phase, the defendant has the opportunity to present "any evidence", including his or her own testimony, "relevant to any mitigating factor" set forth in the statute (CPL 400.27 [6], [9]).[3] Of equal, if not greater significance, is that

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2. This defect was instrumental in the Supreme Court's subsequent decision striking down similar death penalty statutes throughout the country (*see, Furman v Georgia,* 408 US 238).

3. At the sentencing proceeding, the jury may impose, by a unanimous verdict, a sentence of death or a sentence of life imprisonment without parole. The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that "aggravating * * * factors substantially outweigh the

(Cont'd)

the defendant in *Jackson* had complete control of the plea process, i.e., he could plead guilty as of right to the capital kidnapping charge, and thus could avoid the death penalty by his own unilateral action, an option which the United States Supreme Court recognized would be difficult to resist. In contrast, the plea bargain provisions at bar prohibit a capital defendant from pleading guilty, as of right, to murder in the first degree;[4] rather, they merely grant the People the discretion to enter into a plea bargain agreement with the capital defendant so as to remove the case from the capital punishment track.

It must be further emphasized that the practice of plea bargaining was not at issue in *Jackson*; indeed, it was nearly three years later that the United States Supreme Court stated that plea bargaining was a "highly desirable" and "essential component of the administration of justice" which "[p]roperly administered, is to be encouraged" (*Santobello v New York*, 404 US 257, 260, 261; *see also, Bordenkircher v Hayes*, 434 US 357, 361-362). Moreover, in several subsequent decisions, the United States Supreme Court has made it clear that its holding in *Jackson* does not have the broad application ascribed to it by Justice Tomei.

(Cont'd)

mitigating factor or factors established" (CPL 400.27 [11] [a]). If the jury fails to reach a unanimous agreement with respect to the sentence, the court "will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life" (CPL 400.27 [10]).

4. A noncapital defendant in New York may plead guilty to the entire indictment as of right (CPL 220.10 [2]).

Appendix B

In *Brady v United States* (397 US 742), the defendant entered a guilty plea to the Federal Kidnaping Act (18 USC § 1201 [a]) and was sentenced in 1959. Thereafter, the defendant sought postjudgment relief, claiming, in reliance on *Jackson*, that the death penalty provision of the kidnapping statute had needlessly encouraged his guilty plea and the waiver of his right to trial because his plea had been motivated by a fear of the death penalty. In rejecting the defendant's argument, Justice White, speaking for a majority of the Court, stated that the defendant had "read far too much into the *Jackson* opinion" and that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty" (*Brady v United States, supra,* at 746, 755). In his dissent in the companion appeal of *Parker v North Carolina* (397 US 790), Justice Brennan criticized the majority for failing to distinguish between "the legislative imposition of a markedly more severe penalty if a defendant asserts his right to a jury trial and a concomitant legislative promise of leniency if he pleads guilty" and the "very different * * * give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power" (*Parker v North Carolina, supra,* at 809).

In *North Carolina v Alford* (400 US 25), the defendant was indicted for first degree murder, a capital offense. The defendant subsequently entered a guilty plea, with the prosecutor's consent, to second degree murder, which was not punishable by death. The United States Supreme Court rejected the defendant's argument that the plea was invalid under the *Jackson* holding: "We held in *Brady* v. *United States,* 397 U. S. 742 * * * that a plea of guilty which would

not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years was not for that reason compelled within the meaning of the Fifth Amendment" (*North Carolina v Alford, supra,* at 31).

Again, in *Corbitt v New Jersey* (439 US 212), the United States Supreme Court stated: "Decisions after *Jackson* sustained practices that, although encouraging guilty pleas, were not 'needless' * * * Subsequent decisions reaffirmed the permissibility of plea bargaining even though 'every such circumstance has a discouraging effect on the defendant's assertion of his trial rights,' because the 'imposition of these difficult choices [is the] inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas' " (*Corbitt v New Jersey, supra,* at 219, n 9, quoting *Chaffin v Stynchcombe,* 412 US 17, 31). Finally, the United States Supreme Court has noted that "a prosecutor can * * * offer a plea bargain * * * in any particular case [and] a capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice' " (*McCleskey v Kemp,* 481 US 279, 312, quoting *Gregg v Georgia,* 428 US 153, 200, n 50).

Consistent with the principles set forth by the United States Supreme Court concerning plea bargaining in capital cases, two lower courts in this State have declared the plea bargain provisions to be constitutional (*see, People v McIntosh,* 173 Misc 2d 727 [Dutchess County Ct, Aug. 4, 1997]; *People v Chinn,* NYLJ, Nov. 19, 1996, at 31, col 3 [Onondaga County Ct]). In addition, appellate courts in sister States have upheld similar statutory provisions (*see, e.g., Ruiz*

v State, 275 Ark 410, 630 SW2d 44, *cert denied* 459 US 882; *Conger v Warden*, 89 Nev 263, 510 P2d 1359; *Tennessee v Mann*, 1996 WL 465764 [Tenn Crim App]). The Supreme Court of Arkansas held in *Ruiz v State* (*supra*, 275 Ark, at 414, 630 SW2d, at 47) that: "[I]t is well settled that a plea bargain is not invalid per se merely because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty".

The precedents relied on by Justice Tomei are factually inapposite, i.e., they do not involve statutes which enable capital defendants to plea bargain with the People for a lesser penalty (*see, e.g., People v Michael A. C.*, 27 NY2d 79; *State v Johnson*, 134 NH 570, 595 A2d 498; *Commonwealth v Colon-Cruz*, 393 Mass 150, 470 NE2d 116; *State v Frampton*, 95 Wash 2d 469, 627 P2d 922; *State v Funicello*, 60 NJ 60, 286 A2d 55, *cert denied sub nom. New Jersey v Presha*, 408 US 942; *Spillers v State*, 84 Nev 23, 436 P2d 18).

Finally, counsel for Justice Tomei urges that even if "this Court should conclude * * * that [Justice] Tomei's determination is not compelled by *Jackson*, under the Federal Constitution, then it could — and * * * should — uphold his determination under the New York State Constitution".

We respectfully decline to so hold. This Court has previously observed that "any inquiry into the existence of enhanced protection by the State Constitution * * * [is better left] to the Court of Appeals * * * as the State's policy-making tribunal" (*People v Keta*, 165 AD2d 172, 178, *revd on other*

grounds sub nom. People v Scott, 79 NY2d 474).[5] In any event, the Court of Appeals has given its unequivocal approval to the practice of plea bargaining. In *People v Seaberg* (74 NY2d 1), the Court of Appeals stated: "Plea bargaining is now established as a vital part of our criminal justice system. Indeed, as we recognized years ago, the volume of criminal prosecutions is so great that if full trials were required in each case New York's law enforcement system would collapse (*see, People v Selikoff,* 35 NY2d 227, 233, *cert denied* 419 US 1122). Certainly nothing has happened since then to cause us to change that observation. The judicial acceptance of plea bargaining, however, rests upon broader policy considerations. In addition to permitting a substantial conservation of prosecutorial and judicial resources, it provides a means where, by mutual concessions, the parties may obtain a prompt resolution of criminal proceedings with all the benefits that enure from final disposition. The plea bargain, or negotiated sentence, enables the parties to avoid the delay and uncertainties of trial and appeal and permits swift and certain punishment of law violators with sentences tailored to the circumstances of the case at hand (*see generally, Santobello v New York,* 404 US 257, 261; *People v Selikoff,* 35 NY2d 227, 233-235, *supra*). The pleading process necessarily includes the surrender of many guaranteed rights but when there is no constitutional or statutory mandate and no public policy prohibiting it, an accused may waive any right which he or she enjoys (*Schick*

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5. Although this Court's decision in *People v Keta (supra)* was reversed by the Court of Appeals in *People v Scott (supra)*, the reversal was on the merits. The Court of Appeals did not comment on this Court's observation concerning the respective roles of the Appellate Division and the Court of Appeals.

v United States, 195 US 65, 72)" (*People v Seaberg, supra,* at 7).

In light of the foregoing, the motion of the respondent Michael Shane Hale, *inter alia,* to grant the petition in part and deny it in part, or alternatively, to dismiss the proceeding, is denied, the proceeding is converted into an action for a declaratory judgment, and CPL 220.10 (5) (e); 220.30 (3) (b) (vii); and 220.60 (2) (a) are declared to be constitutional. Accordingly the determination of the respondent Tomei to the contrary (*People v Hale,* 173 Misc 2d 140, *supra*) should not be followed.

O'BRIEN, RITTER, THOMPSON and LUCIANO, JJ., concur.

Ordered that the proceeding is converted into an action for a judgment declaring that CPL 220.10 (5) (e); 220.30 (3) (b) (vii); and 220.60 (2) (a) are constitutional; and it is further,

Adjudged that CPL 220.10 (5) (e); 220.30 (3) (b) (vii); and 220.60 (2) (a) are declared to be constitutional; and it is further,

Ordered that the motion by the respondent Michael Shane Hale, *inter alia,* to grant the petition in part and deny it in part, or alternatively, to dismiss the proceeding, is denied.

APPENDIX C — DECISION OF APPELLATE DIVISION, FOURTH DEPARTMENT IN *MATTER OF RELIN v. CONNELL*, __ A.D.2d __, 674 N.Y.S.2d 192 (4th Dep't 1998)

Matter of Honorable Howard R. RELIN, as Monroe County District Attorney, Petitioner,

v.

Honorable John J. CONNELL, as Monroe County Court Judge, Angel Mateo, Respondents,

and

Honorable Dennis C. Vacco, Attorney General of New York State, Intervenor.

Supreme Court, Appellate Division, Fourth Department.

June 10, 1998.

* * *

Monroe County District Attorney (Wendy Lehmann, of counsel), Rochester, for petitioner.

John J. Connell by Donald Thompson, Rochester, for respondent Connell.

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Capital Defender's Office by Joseph Flood, Rochester, for respondent Mateo.

New York Civil Liberties Union by Christopher Dunn, New York City, for amicus curiae.

Richard A. Brown, District Attorney of Queens County, Kew Gardens, for New York State District Attorneys' Association, amicus curiae.

Before LAWTON, J.P., and HAYES, PIGOTT, BOEHM and FALLON, JJ.

MEMORANDUM:

The People commenced this original CPLR article 78 proceeding seeking, *inter alia,* to prohibit respondent the Honorable John J. Connell from enforcing an order declaring CPL 220.10(5)(e), 220.30(3)(b)(vii) and 220.60(2)(a) unconstitutional. We deny that part of the petition seeking a writ of prohibition (*see generally, Matter of Gold v. Gartenstein,* 54 N.Y.2d 627, 442 N.Y.S.2d 504, 425 N.E.2d 892; *Matter of Van Wie v. Kirk,* __ A.D.2d __, __ N.Y.S.2d __ [decided herewith]). Because this issue is of critical importance and is likely to recur, we grant that part of the petition seeking, in the alternative, to convert the proceeding to a declaratory judgment action (*see,* CPLR 103[c]; *Matter of Morgenthau v. Roberts,* 65 N.Y.2d 749, 751, 492 N.Y.S.2d 21, 481 N.E.2d 561; *Matter of Morgenthau v. Erlbaum,* 59 N.Y.2d 143, 151-152, 464 N.Y.S.2d 392, 451 N.E.2d 150, *cert. denied* 464 U.S. 993, 104 S.Ct. 486, 78 L.Ed.2d 682), and we grant judgment declaring those sections constitutional.

Appendix C

The People contend that the provisions of New York's death penalty statute governing kinds of pleas (CPL 220.10[5][e]), those governing pleas to part of an indictment or covering other indictments (CPL 220.30[3][b][vii]) and those governing the change of a plea (CPL 220.60[2][a]) do not violate respondent Angel Mateo's right to a jury trial and therefore are constitutional. We agree. Those sections do not grant a defendant the unilateral right to plead guilty and thereby avoid the death penalty, and thus they do not "needlessly encourage[ ]" guilty pleas in violation of defendant's right to demand a jury trial (*United States v. Jackson,* 390 U.S. 570, 583, 88 S.Ct. 1209, 20 L.Ed.2d 138; *see, Matter of Hynes v. Tomei,* 237 A.D.2d 52, 666 N.Y.S.2d 687; *see also, Corbitt v. New Jersey,* 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466; *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162; *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747). Contrary to Mateo's contention, those provisions do not violate the N.Y. Constitution (*see generally, People v. Seaberg,* 74 N.Y.2d 1, 7, 543 N.Y.S.2d 968, 541 N.E.2d 1022). Indeed, they provide a defendant charged with a capital crime with an opportunity to plead guilty.

We have reviewed respondents' remaining contentions and conclude that they are without merit.

Consequently, we grant the petition in part, convert the proceeding to an action for a declaratory judgment and grant judgment in favor of petitioner declaring that CPL 220.10(5)(e), 220.30(3)(b)(vii) and 220.60(2)(a) are constitutional.

Petition unanimously granted in part without costs and judgment granted.

APPENDIX D — APPLICABLE PORTION OF DECISION OF JUSTICE ALBERT TOMEI IN *PEOPLE v. MICHAEL SHANE HALE*, 173 Misc. 2d 140, 178-87, 661 N.Y.S.2d 457, 478-84 (N.Y. Sup. Ct., Kings County 1997)

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v MICHAEL SHANE HALE, Defendant.

Supreme Court, Kings County, June 6, 1997

* * *

APPEARANCES OF COUNSEL

Kevin M. Doyle, Capital Defender, New York City (*Kelley J. Sharkey, John M. Youngblood* and *Sonya A. Zoghlin* of counsel), for defendant. *Charles J. Hynes, District Attorney* of Kings County, Brooklyn (*Keith Dolan, Deborah Stevens Modica* and *Kyle C. Reeves* of counsel), for plaintiff.

OPINION OF THE COURT

ALBERT TOMEI, J.

In an omnibus motion filed on January 21, 1997, the defendant requests numerous orders and hearings. The People filed papers in opposition, and the defendant filed a reply. Oral argument was heard on the motions. The defendant's motions are resolved as follows:

* * *

Appendix D

IV. MOTION CHALLENGING GUILTY PLEA AND "NO BENCH TRIAL" PROVISIONS OF THE CRIMINAL PROCEDURE LAW

The defendant claims that provisions of the Criminal Procedure Law which prohibit him from pleading guilty without the consent of the District Attorney and the permission of the court, and prohibit him from waiving his right to a jury trial, violate various New York and Federal constitutional provisions. In opposition, the People argue not only that the contested statutes comply with constitutional mandates, but that the defendant does not have standing to raise a challenge to the statutory limits on guilty pleas in capital cases, since there is nothing in the record to suggest that the defendant has offered to enter a plea of guilty.[19]

Standing

The People assert that the defendant cannot challenge the provisions regulating guilty pleas in capital cases because he has not offered to plead guilty, and therefore has not suffered any injury in fact. In the court's opinion, this argument is untenable. As discussed in detail below, the defendant does not assert merely that he has been denied the right to plead guilty, but that the plea provisions effectively penalize his right to a jury trial. Assuming arguendo that the plea provisions are defective, the defendant is, in fact, harmed, because his right to a jury trial is impaired by plea provisions that penalize that right. Therefore, even if the defendant were

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19. The court is aware that there have been plea discussions in this case.

to abjure a plea and exercise his right to a jury trial, he would have standing to raise this claim. (*See, Robtoy v Kincheloe,* 871 F2d 1478, 1480 [9th Cir 1989].)

CPL 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a)

CPL 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a) permit a defendant charged with murder in the first degree to plead guilty only when the sentence to be imposed pursuant to the plea is one authorized for murder in the first degree, other than death.[20] In addition, the plea must be with the permission of the court and the consent of the People. (*See,* CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]; 220.60 [2] [a].)

In *United States v Jackson* (390 US 570 [1968]), the Supreme Court of the United States struck down the death penalty provision of the Federal Kidnaping Act (commonly known as the Lindbergh Law) which provided, in pertinent part, that: " 'Whoever knowingly transports in interstate * * * commerce, any person who has been unlawfully * * * kidnaped * * * and held for ransom * * * or otherwise * * * shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.' " (*United States v Jackson,* 390 US, *supra,* at 570-571, quoting 18 USC § 1201 [former (a)].) The Court interpreted the Act to authorize the imposition of the death penalty only after a jury

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20. The permissible nondeath sentences for a conviction of murder in the first degree are an indeterminate term of imprisonment of a minimum of 20 to 25 years to a maximum of life, or life without parole. (*See,* Penal Law §§ 60.06, 70.00 [3] [a] [i].)

trial, but not following conviction upon a guilty plea or a nonjury trial. (*United States v Jackson,* 390 US, at 571.)

Concluding that the Act's death penalty provision was unconstitutional, the Court remarked that "the defendant's assertion of the right to [a] jury trial may cost him his life, for the federal statute authorizes the jury — and only the jury — to return a verdict of death." (*See, United States v Jackson,* 390 US 570, 572, *supra.*) The Court held that the statute was unconstitutional because it "needlessly penalize[d] the assertion of a constitutional right." (*Supra,* at 583, citing *Griffin v California,* 380 US 609.) According to the Court, the statute needlessly encouraged guilty pleas and effectively penalized the right to a jury trial by exposing the defendant to the risk of death only when he exercised his constitutional rights.

The evil of the Act was that it "tend[ed] to discourage defendants from insisting upon their innocence and demanding trial by jury". (*United States v Jackson,* 390 US, *supra,* at 583.) "[T]he defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." (*United States v Jackson,* 390 US, at 581.)[21]

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21. In 1971, in single-paragraph orders that did not elaborate the basis for the decisions — except to say that, "Judgments, insofar as they impose the death sentence, reversed and cases remanded" — the Supreme Court reversed seven death penalty convictions arising out of New Jersey, North Carolina, and South Carolina, citing *United States v Jackson (supra)* among other cases. (*See,* 403 US 948 [1971].)

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It is apparent that New York's death penalty statute, likewise, provides for the imposition of the death penalty only upon recommendation of the jury; the provisions governing pleas in capital cases in New York expressly forbid the imposition of the death penalty upon a plea of guilty (*see,* CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]; 220.60 [2] [a]), and a defendant may not waive a jury trial where the crime charged may be punishable by death. (*See,* NY Const, art I, § 2.)[22] Only if the defendant insists upon exercising his Sixth

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22. It may be argued that article I, § 2 can be interpreted to prohibit guilty pleas in capital cases. The provision states, in pertinent part, that "[a] jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death". (NY Const, art I, § 2.) Since a defendant necessarily waives his right to a jury trial by entering a guilty plea, it is logical to conclude that article I, § 2 forbids guilty pleas in capital cases. This construction would eliminate the concerns voiced in *Jackson (supra),* because defendants would not be forced to choose between relinquishing their constitutional rights and risking death. All death-eligible defendants would be required to have their cases adjudicated in jury trials, an apparently permissible result under *Jackson.* (*See, United States v Jackson,* 390 US, at 584-585 [Court held that requiring all capital defendants to go to trial would not be unconstitutional, but was not intended by Congress when it enacted Federal Kidnaping Act].) However, this interpretation appears to be foreclosed by cases which hold that article I, § 2 guarantees only that if a defendant wishes to exercise his right to a trial, he is entitled to be tried before a jury. However, if a defendant pleads guilty, choosing not to seek a trial, article I, § 2 is not implicated. (*See, e.g., People v Hardy,* 53 AD2d 647, 648 [2d Dept 1976] [holding that article I, § 2 is not applicable to guilty plea by which defendant elects not to litigate guilt, but instead gives defendant who elects to stand trial the right to obtain trial before court without a jury].) Thus, there appears to be no constitutional impediment to a defendant's pleading guilty to a death-eligible offense. Neither the People nor the defendant argue otherwise.

Amendment right to a jury trial and his Fifth Amendment privilege against self-incrimination does he risk death. Therefore, unless New York's law may be distinguished from the Act in question in *Jackson (supra),* this court is bound to find the plea provisions to be unconstitutional. (*See, People v Black,* 34 AD2d 999, *affd without opn* 30 NY2d 593 [1972] [in obiter dicta, citing *Jackson,* Appellate Division stated that where the death sentence may be imposed, when appropriate, only upon a jury verdict of guilty (Penal Law former § 125.30), under such statutory scheme death penalty is unconstitutional since it needlessly encourages taking of guilty pleas]; *compare, Lyons v Howard,* 434 F2d 632, 633 [6th Cir 1970] [finding Kentucky's death penalty statute distinguishable from that in *Jackson* because capital defendant in Kentucky subjects himself to death penalty whether he is tried before a jury, to the court, or pleads guilty].)

The People point out that, by contrast with the Federal law in question in *Jackson (supra),* New York's statute, along with the New York Constitution, does not permit death-eligible defendants to waive the right to a jury trial. (*See,* NY Const, art I, § 2; CPL 320.10 [1].) Thus, the People argue, because New York does not permit death-eligible defendants to waive their right to a jury trial, capital defendants are not needlessly encouraged to abandon that right; indeed, it is impossible for them to do so.

Not only are the People wrong is asserting that New York's statute does not require defendants, at least incidentally, to waive their right to a jury trial to avoid the risk of death (*see, People v Lee,* 58 NY2d 491, 494 [1983]

[guilty plea waives, *inter alia,* right to jury trial]), but New York's scheme actually results in greater prejudice to the defendant than that in *Jackson (supra).* Under the Federal Kidnaping Act, a defendant could avoid the risk of death in two ways: he could either plead guilty, thereby relinquishing his Sixth Amendment right to a jury trial and his Fifth Amendment privilege against self-incrimination, or he could request a bench trial, thereby waiving only his right to a trial by jury. (*See, United States v Jackson,* 390 US, *supra,* at 571.) By contrast, under New York law, a defendant may avoid the risk of death only by pleading guilty, waiving both rights: his right to a jury trial; and his privilege against self-incrimination, as well.

In any event, *Jackson* makes clear that two rights are violated by death penalty schemes which provide for the imposition of death only after a jury trial: the Sixth Amendment right to a jury trial; and the Fifth Amendment right not to plead guilty. (*United States v Jackson,* 390 US, *supra,* at 581, citing *Herman v Claudy,* 350 US 116.) Therefore, even assuming that the statute's fault did not implicate the right to a jury trial, it would still infringe upon the defendant's Fifth Amendment rights.

Next, the People argue that *Jackson (supra)* is distinguishable because, under the New York law, "an open plea of guilty is not possible". According to the People, because the defendant must secure the permission of the court and the consent of the People before entering a guilty plea, "a defendant cannot heedlessly tender a plea of guilty to the entire indictment." However, in *Jackson,* the defendant did not have the unbridled right to enter a guilty plea, either.

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Justice White, in a dissent joined by Justice Black, argued that any defect in the Federal Kidnaping Act could be addressed by "making it clear that pleas of guilty and waivers of jury trial should be carefully examined before they are accepted, in order to make sure that they have been neither coerced nor encouraged by the death penalty power in the jury." (*United States v Jackson,* 390 US, *supra,* at 592 [White, J., dissenting].) Rejecting the dissent's solution, the Court noted that, "[t]he power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the capital punishment provision". (*United States v Jackson,* 390 US, at 583.) The Court made it clear that it was the needless encouragement of guilty pleas together with the penalty imposed upon defendants who exercised their right to a jury trial which rendered the statute infirm.

While it is true that in *Jackson (supra),* the consent of the prosecutor was not required to enter a guilty plea, this is a distinction without a difference. (*Cf., Spillers v State,* 84 Nev 23, 436 P2d 18, 21-23 [1968] [striking down death penalty statute that provided for imposition of death only after jury trial, and permitted defendant to waive jury with permission of court and consent of prosecutor].) If, as the *Jackson* Court proclaimed, judicial scrutiny of pleas is no remedy for the constitutional infirmity, the problem is not relieved by requiring the further consent of the prosecutor, who, after all, as the defendant's adversary, cannot be said to have the defendant's best interests first and foremost in mind. It is to the prosecutor's advantage to use the threat of death upon a conviction by jury to induce defendants to accept guilty pleas to avoid that risk. Indeed, one might argue that

the prosecutor is most likely to consent to guilty pleas not in cases where guilt is certain and the likelihood of a death verdict is high, but in cases where proof of guilt is wanting. It is in those cases that one is most likely to find the "defendant ingenuous enough to seek a jury acquittal" (*United States v Jackson*, 390 US, at 581), but who is chilled in exercising his rights by the threat of death upon a jury verdict.

Nor can one argue that New York's plea provisions are sustainable because they codify permissible plea bargaining. It is true, in principle, that a capital defendant may bargain to plead guilty to a crime that is not punishable by death, thereby avoiding the risk of capital punishment. (*See, Brady v United States*, 397 US 742 [1970].) What is forbidden is a scheme, like New York's, in which the possibility of death only arises from the defendant's exercise of his right to a jury trial. (*Cf., Corbitt v New Jersey*, 439 US 212, 226 [1978] [Stewart, J., concurring in the judgment] [unlike Act at issue in *Jackson (supra)*, New Jersey statute did not provide for death, and convicted defendant could be sentenced to maximum penalty of life imprisonment whether he pleads guilty or goes to trial].)

To avoid this problem, the overwhelming majority of death penalty jurisdictions, including the Federal system, provide that if a defendant pleads guilty to capital murder, his sentence is to be determined in a penalty proceeding after which death or a term of imprisonment may be imposed. (*See, e.g.*, Fla Stat Annot, tit XLVII, § 921.141; 720 Ill Comp Stat Annot 5/9-1; Ohio Rules Crim Pro, rule 11 (C) (3); 42 Pa Cons Stat Annot § 9711; 18 USC § 3593 [b].) In Arkansas, defendants are not permitted to waive a jury trial unless the

State first revokes its intent to seek the death penalty, and thus the *Jackson* problem is avoided. (*See,* Ark Rules Crim Pro rule 31.4; Ark Stat Annot § 41-1302 [1], now Ark Code Annot § 5-4-603; *see also, Ruiz v State,* 275 Ark 410, 630 SW2d 44, 47 [1982].) The court has surveyed the laws of every other death penalty State, and it appears that no other jurisdiction permits guilty pleas to capital murder, yet provides for the imposition of death only, after the defendant contests his guilt before a jury, as New York does. By removing the disparity in potential punishment between defendants who request a jury trial and those who plead guilty, other States have addressed the concerns of *Jackson (supra).* No doubt, these States enacted those provisions for that very purpose, and in some instances, in response to opinions of their highest courts striking down death penalty provisions pursuant to *Jackson.* (*See, State v Johnson,* 134 NH 570, 595 A2d 498 [1991]; *Commonwealth v Colon-Cruz,* 393 Mass 150, 470 NE2d 116 [1984];[23] *State v Frampton,* 95 Wash 2d 469, 627 P2d 922 [1981]; *State v Funicello,* 60 NJ 60, 286 A2d 55 [1972]; *Spillers v State,* 84 Nev 23, 436 P2d 18 [1968], *supra.*)

Indeed, the Supreme Court created a road map for States to follow in complying with the mandate of *Jackson (supra).* The *Jackson* Court noted that, "[i]n some States, for example, the choice between life imprisonment and capital punishment is left to a jury in *every* case — regardless of how the defendant's guilt has been determined." (*United States v Jackson,* 390 US, at 582 [emphasis in original].) The Court concluded that "[g]iven the availability of this and other

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23. Massachusetts did not reinstate the death penalty.

alternatives, it is clear that the selective death penalty provision of the Federal Kidnaping Act cannot be justified." (*United States v Jackson,* 390 US, at 582-583.) It does not suffice to claim that, because the intention of the Legislature may have been to mitigate the severity of the death penalty by permitting nondeath pleas to capital crimes, the statute passes constitutional muster. As the Supreme Court held in *Jackson*, "[w]hatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." (*United States v Jackson,* 390 US, at 582.)

While New York courts in the past have not had occasion to apply *Jackson (supra)* to a death penalty statute,[24] its import has not been lost on the Court of Appeals. In *People v Michael A. C.* (27 NY2d 79, 86 [1970]), the Court of Appeals struck down the provision of the former Code of Criminal Procedure which allowed for youthful offender treatment for certain defendants only if they waived their right to a jury trial. (*See, People v Michael A. C.*, 27 NY2d, at 86.) The Court held that "although any defendant, including a youthful offender, is free to consent to a trial without a jury if, in fact and reality, he prefers to be so tried — and knowingly waives his constitutional right — this does not mean that a State may demand that such a consent be given as an absolute

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24. In *People v Black* (34 AD2d 999, *affd without opn* 30 NY2d 593 [1972], *supra*) the Appellate Division, in obiter dicta, cited *Jackson (supra)* for the proposition that where the death penalty may be imposed, when appropriate, only upon a jury verdict of guilty (*see,* Penal Law former § 125.30), under such a statutory scheme the death penalty is unconstitutional since it needlessly encourages the taking of guilty pleas.

precondition to affording him the benefits of youthful offender treatment." (*People v Michael A. C.*, 27 NY2d, at 86, citing *United States v Jackson; Nieves v United States*, 280 F Supp 994.) It noted that, "[t]he defendant in the case before us would not, it is true, have been subject to the death penalty had he refused to consent to a nonjury trial but he certainly would have been exposed to a considerably longer period of imprisonment than he could receive if prosecuted as a youthful offender." (*People v Michael A. C.*, 27 NY2d, 79, 86 [1970].) "[A] procedure which offers an individual a reward for waiving a fundamental constitutional right, or imposes a harsher penalty for asserting it, may not be sustained." (*People v Michael A. C.*, 27 NY2d, at 86.)

Needless to say, if it infringes upon a noncapital defendant's rights to condition youthful offender treatment upon jury waiver, a fortiori, it is impermissible, in a case involving capital punishment, which is "unique in its severity and irrevocability" (*Gregg v Georgia*, 428 US 153, 187, *supra*), to do the same. (*Cf., Corbitt v New Jersey*, 439 US, *supra*, at 217 [distinguishing *Jackson (supra)* by finding that pressures to forego trial and plead guilty are different in capital case because of unique quality of capital punishment].)

Lastly, the People attempt to distinguish *Jackson (supra)* by claiming that "the federal statute operated as a mandatory death penalty scheme." It is difficult to understand how this alleged distinction leads to different result. Insofar as the holding of *Jackson* is concerned, it is of no consequence that one statute mandated death upon conviction, while the other allows the possibility of the imposition of death in the jury's discretion after a separate penalty phase. Both statutes share

the same defect: penalizing defendants by subjecting them to the risk of death only upon their exercise of the right to jury trial.

In any event, the People's reading of the Federal Kidnaping Act is plainly wrong. The Act provided for a sentence of death "*if * * * the jury shall so recommend*" (emphasis supplied), or "imprisonment for any term of years or for life, if the death penalty is not imposed." (18 USC § 1201 [former (a)].) In the face of this plain language, the People's claim that the Act mandated death upon conviction strains credulity, to say the least.

In sum, all attempts by the People to distinguish New York's statute from the death penalty provision at issue in *Jackson (supra)* fall short.

"Courts of first instance should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases involving life and liberty, and where the invalidity of the act is apparent on its face." (McKinney's Cons Laws of NY, Book 1, Statutes § 150 [a], at 312-313.) This is such an instance. Plainly, life and liberty are at stake in this case. Moreover, as much as the court may wish to effect the intent of the Legislature and harmonize the plea provisions with constitutional requirements, the court does not fulfill its obligations by turning a blind eye to the compelling evidence of their unconstitutionality. "In the field of federal constitutional law, the decisions of the United States Supreme Court are of course binding upon all state courts." (*State v Forcella,* 52 NJ 263, 294, 245 A2d 181, 198 [1968] [Jacobs and Hall, JJ., dissenting].) "Our clear responsibility

is to apply those decisions with due regard for their tenor, principles and goals in analogous situations with the aim of determining a matter as we conscientiously believe that Court would if the case were before it." (*Supra*, 52 NJ, at 294-295, 245 A2d, at 198.) "No Judge must ever hesitate to act when a statute's constitutional invalidity is apparent beyond a reasonable doubt." (*People v Velez*, 88 Misc 2d 378, 395 [NY County 1976] [striking down mandatory death penalty statute].)

In the face of overwhelming evidence — the *Jackson* decision *(supra)* itself; the decisions of several States' highest courts applying *Jackson* to strike down their statutes, which were substantially similar to New York's; the *People v Michael A. C.* decision *(supra)*, which applies the *Jackson* rationale to a non-capital case; and the fact that apparently no other jurisdiction has a statutory scheme that permits guilty pleas but allows for the imposition of death only after jury trial — the court is led ineluctably to the conclusion that CPL 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a) do not conform to the requirements of the Fifth and Sixth Amendments to the United States Constitution, and corresponding provisions of the New York Constitution.

The court reaches this decision for the sole reason that any other result is foreclosed by the holding of *United States v Jackson (supra)*. However, the court notes in passing that finding these provisions to be unconstitutional at this juncture, rather than "rubber-stamping" them so that the Court of Appeals may subsequently pass upon their constitutionality years later, serves not only the interests of fundamental fairness, but judicial economy, as well. It makes no sense to

permit convictions under these suspect provisions, only to have those cases reversed upon appeal years later, burdening the courts and the parties with retrials.

In this vein, mindful that the law-making function is left to the Legislature alone, the court respectfully invites the Legislature to consider whether to enact plea provisions to conform with the practices of other States that have constructed statutes to comply with *Jackson (supra)*.

Severability

New York's death penalty statute contains a saving clause, which provides that: "If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, part or provision thereof." (L 1995, ch 1, § 37.) If a statute contains a saving clause, there arises a presumption that the Legislature intended for only the portion of the statute which is deemed to be defective to be stricken. Only if the court concludes that the provision in question cannot be severed from the rest of the statute, or that, notwithstanding the saving clause, the Legislature did not intend for the statute to remain in effect without the particular provision, should the court strike the statute as a whole. As Judge Cardozo stated: "The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded,

or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots." (*People ex rel. Alpha Portland Cement v Knapp,* 230 NY 48, 60.)

Having determined that the plea provisions are unconstitutional, the court must determine whether to strike the death penalty statute as a whole, or whether it will suffice to invalidate only the defective provisions, leaving the remainder of the law in place. The court concludes that the plea provisions may be severed from the remainder of the law, and that there is no reason to conclude that the Legislature did not intend for the statute to remain in effect absent those provisions.

There is no question that CPL 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a) constitute discrete provisions pertaining only to capital cases. As such, they may be severed without doing injury to the remainder of the Criminal Procedure Law. Nor would severance lead to impermissible results in capital cases.

Since the right to plead guilty is a creature of statute, and is not mandated constitutionally (*see, Corbitt v New Jersey,* 439 US, *supra,* at 222-223; *cf., People v Melo,* 160 AD2d 600 [1st Dept 1990]), the court may strike the contested statutes, thereby leaving no provision for guilty pleas in death-eligible cases, and thus curing the constitutional defect. The effect of severing the provisions will be to prohibit pleas in cases in which a notice of intent to seek the death penalty

has been filed and is in effect. In cases in which the crime of murder in the first degree is charged and no such notice has been filed, or where the notice has been revoked by the District Attorney, a defendant may plead guilty pursuant to CPL 220.10 (5) (d) (i), which provides for pleas where the charge is a class A felony.

Therefore, CPL 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a) shall be deemed stricken from the death penalty statute. The defendant's motion in all other respects is denied.

* * * *

APPENDIX E — APPLICABLE PORTION OF DECISION OF JUDGE JOHN J. CONNELL IN *PEOPLE v. ANGEL MATEO*, (Unreported) (N.Y. Co. Ct., Monroe County, Aug. 25, 1997)

* * *

MOTION DECLARING CPL §§220.10 (5) (E) 220.30 (3) (B) (VII) AND 220.60 (2) UNCONSTITUTIONAL (AM-18)

MOTION FOR AN ORDER DECLARING CPL §320.10 AND ARTICLE I, §2, OF THE NEW YORK STATE CONSTITUTION UNCONSTITUTIONAL (AM-19)

The defendant seeks an Order declaring those sections of the Criminal Procedure Law prohibiting guilty pleas without the consent of the People and the court unconstitutional as they apply to the crime of Murder in the First Degree.

Criminal Procedure law §220.10 (5) (e) provides in pertinent part that "[A] defendant may not enter a guilty plea to the crime of murder in the first degree as defined in Section 125.27 [without] permission of the court and the consent of the people". The defendant argues that the guilty plea provisions of CPL §220 impermissibly penalize his exercise of the right to trial as protected by the 6th Amendment of the United States Constitution and Article I, Section 2 of the New York State Constitution because the defendant can only be sentenced to death if he elects to go to trial.

Initially, the People argue that this motion should be denied as premature because the defendant has not shown

any actual or threatened injury to a protected right, i.e. he has not offered to plead guilty. Since the statutory scheme under consideration denies the defendant an unfettered right to enter a guilty plea, his offer to so plead is immaterial and he has standing to challenge the statute (*People v. Hale*, __ Misc2d __ [Supreme Ct., Kings County, 1997]; *People v. McIntosh*, __ Misc2d __ [Dutchess County, 1997]).

The issue, then, is whether New York's statutory prohibition against open guilty pleas runs afoul of *United States v. Jackson* (390 US 570). In *Jackson* the United States Supreme Court ruled a statute under consideration unconstitutional in that a defendant, under the statute as written, could only avail himself of his 6th Amendment right to a jury trial and 5th Amendment right against self incrimination by risking death. The People have attempted to differentiate the statute under consideration in *Jackson* from these provisions of the New York statute because the statute requires the consent of the Court *and* the District Attorney before a plea of guilty to Murder in the First Degree may be entered and a sentence other than death imposed. As Justice Tomei wrote *Hale*, "this is a distinction without a difference". The consent of the Court is always required before a plea will be accepted. The addition of requiring the consent of the District Attorney before allowing a guilty plea does not ameliorate the problem and, in fact, may exacerbate it, and gives no assurance that a plea will not be coerced. One can foresee situations where prosecutors would only consent to pleas where evidence of guilt is somewhat weak. Thus, it would seem that only defendants who are "ingenuous enough" to seek their acquittal risk death (*United States v. Jackson*, supra at 581).

Appendix E

It has been argues that the statutory scheme struck down in Jackson is distinguishable from the statutory scheme in New York in that a defendant in New York who is charged with first degree murder may only insulate himself from death through plea negotiations with the District Attorney, either before Notice of Intent is filed or thereafter, and that the process of bargaining between a prosecutor and a defendant on plea or sentence, although somewhat coercive, had not been held to be unconstitutional (*Bordenkircher v. Hayes*, 424 US 357). Bargaining life and liberty, however, are different. Generally in a plea bargaining situation, a defendant may very well wish to gamble a number of years of his liberty in negotiating with the prosecutor and weigh the risks inherent in that process accordingly. However, the finality of death eliminates true negotiation because no longer is the same item being bargained.

The Court therefore finds that CPL §§220.10 (5) (e) 220.30 (3) (b) (vii) and 220.60 (2) are unconstitutional under the 5th and 6th Amendments of the United States Constitution an the corresponding provisions of the New York State Constitution.

The defense further proposes that should this Court declare, as it has done, that the guilty plea provisions of New York's death penalty statute are unconstitutional, that this Court strike the entire statute. This Court declines to do so and finds that the guilty plea sections of New York's death penalty statute, as set forth herein, can be stricken and that there is now no provision for the defendant to enter a plea of guilty in this death eligible case. Pleas of guilty pursuant to CPL §220.10 (5) (d) (I) remain an option in first degree

murder cases where no Notice of Intent to Seek the Death Penalty has been filed or has been withdrawn and sentencing will be conducted pursuant to CPL §400.27 (1).

The final aspect of this application (AM-19) is a request to declare both CPL §320.10 and Article I, §2, of the New York Constitution, which prohibits a capital defendant from waiving the right to a jury trial at the guilt phase of his trial, unconstitutional.

There is no constitutional right to a non-jury trial in New York and none is recognized at the federal constitutional level (New York Const, Art. I, §2 and *Singer v. United States*, 380 US 24, 34). Therefore, the defendant's motion on this issue is denied.

* * * *

(2)

Supreme Court, U.S.
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No. 98-1533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION FOR RESPONDENT JUDGE JOHN J. CONNELL

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QUESTION PRESENTED

Whether this Court's decision in *United States v. Jackson* (390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)) should be overruled or limited.

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STATEMENT OF THE CASE

The petition seeks reversal of this Court's decision in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1211, 20 L. Ed. 2d 138 (1968). In the alternative, petitioners argue that the lower court misconstrued *Jackson* as requiring an order vacating as unconstitutional the plea provisions of New York's capital statute.

After respondent Mateo was indicted for capital murder, he challenged the constitutionality of New York State's capital plea provisions (Criminal Procedure Law §§ 220.10[5][e], 220.30[3][b][vii], and 220.60[2]).[1] Respondent Connell, assigned to preside over Mateo's case, held that New York's capital plea provisions violate the Fifth and Sixth Amendments of the United States Constitution, the corresponding provisions of the New York State Constitution, and this Court's holding in *United States v. Jackson* (390

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1. CPL §§ 220.10(5)(e) and 220.30(3)(b)(vii) are identically worded and read:

> A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

CPL § 220.60(2) conditions a defendant's right to change his plea from not guilty to guilty on the restrictions set forth in CPL § 220.10.

U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)). Respondent Connell reasoned that New York's capital plea provisions (which prohibit a defendant from pleading guilty to capital murder once the prosecution has filed a notice of intention to seek the death penalty unless such notice is withdrawn) are indistinguishable from the statute struck down in *United States v. Jackson* because in both cases, those defendants that forego their right to trial may not be sentenced to death; only those defendants who are "ingenious enough" to seek their acquittal risk death.

In response to petitioner Relin's interlocutory challenge to respondent Connell's decision, the Appellate Division, Fourth Department declared New York State's capital plea provisions constitutional, reasoning that those provisions

> do not grant a defendant the unilateral right to plead guilty and thereby avoid the death penalty, and thus they do not "needlessly encourage[]" guilty pleas in violation of defendant's right to demand a jury trial

(*Matter of Relin v. Connell*, 251 A.D.2d 1041, 674 N.Y.S.2d 192 (1998)).

On appeal, the Court of Appeals reversed the Appellate Division's decision, holding, as respondent Connell had, that New York's capital plea provisions violated the directives of this Court's decision in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) (*Matter of Hynes v. Tomei*, 92 N.Y.2d 613, 684 N.Y.S.2d 177 (1998)). Petitioners sought a stay of execution of that decision from the Court of Appeals and subsequently, from this Court; both requests were summarily denied.

PETITIONERS' MISREPRESENTATIONS OF FACT AND LAW

Petitioners contend that respondent Connell found New York's capital plea provisions unconstitutional because, among other things, "plea bargaining in capital cases was inherently unbalanced and, therefore, unconstitutional" (Pet. 6). Contrary to petitioners' claims, while respondent Connell noted the unequal positions of the parties in capital plea negotiations, his analysis of the constitutionality of the New York statute did not turn on (or rely in any way on) that disparity (Pet. 56a). In fact, Judge Connell noted that this Court has sanctioned plea bargaining, notwithstanding any disparity in bargaining positions between parties (Pet. 56a). As a cursory reading of Judge Connell's decision makes clear, he struck down New York's capital plea provisions because they were indistinguishable from the statutory scheme invalidated by this Court in *Jackson*, not for any reason (such as the disparate bargaining position of the parties) not addressed by or relevant to the *Jackson* decision.

Petitioners claim that the Court of Appeals found New York's capital punishment statute to be distinguishable from the Federal Kidnaping Act at issue in *Jackson* because in *Jackson* the defendant had the unilateral right to plead guilty, whereas a New York capital defendant has no such ability (Pet. 8, 17-18). Contrary to petitioners' claims, the Court of Appeals never found this to be a valid distinction and, as Judge Connell noted in his decision, it is not (Pet. 55a). Rather, the Court of Appeals held that, as with the New York statute, the defendant in *Jackson* could *not* unilaterally plead guilty, "since Federal Trial Judges had discretion to reject guilty pleas and jury trial waivers" (Pet. 9a; *see also*, F. R. Cr. P. 11; *North Carolina v. Alford*, 400 U.S. 25, 38, 91

S. Ct. 160, 27 L. Ed. 2d 162 (1970) [court's discretion to reject pleas]; *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); *Lynch v. Overholser*, 369 U.S. 705, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962)). As Judge Connell ruled, and as the Court of Appeals echoed, whether the power to consent to a defendant's plea rests in the court alone (as in *Jackson*) or with both the court and the prosecutor (as in New York's capital statute) is a "distinction without a difference," wholly irrelevant to the constitutional infirmity of the statute (Pet. 10a, 55a).

Even if such a distinction could legitimately be drawn, it is clear that requiring the court's permission before a guilty plea may be entered cannot save an otherwise unconstitutional statute. In *Jackson*, the Government made this argument and this Court rejected it, on the ground that "the power to reject coerced pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the [statute]" (*United States v. Jackson*, 390 U.S. at 583). Requiring prosecutorial consent to a defendant's guilty plea will also not save an otherwise unconstitutional statute, as the *Jackson* decision itself makes clear. In *Jackson*, the district court reasoned that whether defendants could waive a jury trial absent consent of the government and approval of the court was not an issue that needed to be resolved in order to rule on the constitutionality of the Federal Kidnaping Act (*United States v. Jackson*, 262 F. Supp. 716, 718 (**year?**), a holding left undisturbed by this Court (*see also United States ex rel. Mullen v. Henderson*, 312 F. Supp. 1363, 1367 (1970)).

In fact, the argument that petitioners now make — that requiring the prosecutor or the court to consent to the entry of a guilty plea will save a statute that otherwise violates *Jackson* — was rejected by this Court just three years after

Jackson was decided. Following *Jackson*, but before the constitutionality of the New Jersey capital statute then in effect was considered by this Court, the New Jersey Supreme Court attempted to distinguish its capital statute from the Federal Kidnaping Act on the ground that the New Jersey statute required the court's consent before a guilty plea could be entered. The court claimed that this difference rendered New Jersey's law constitutional (*Forcella v. State*, 245 A.2d 181, 187 (1968)). This Court rejecting that reasoning and summarily vacated the defendant's death sentence on *Jackson* grounds when it addressed the constitutionality of the New Jersey statute in a subsequent case (*Funicello v. New Jersey*, 403 U.S. 948, 91 S. Ct. 2278, 29 L. Ed. 2d 859 (1971)).

Any remaining question regarding whether a defendant's inability to unilaterally plead guilty would rescue a statute in the face of a *Jackson* challenge was answered when, following *Jackson*, this Court vacated the guilty pleas of six North Carolina defendants entered under a capital statute found to violate *Jackson* (*Atkinson v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Atkinson v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Childs v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1970); *Hill v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Roseboro v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Sanders v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Williams v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971).[2] In each of the above cases, the State unsuccessfully argued, both before this Court and the North Carolina

2. Atkinson received two death sentences; one for rape (*see State v. Atkinson*, 179 S.E.2d 410), the other for murder (*see State v. Atkinson*, 167 S.E.2d 241 (1971)).

Supreme Court, that the capital statute under which the defendants pled guilty was constitutional because it did not permit unilateral guilty pleas. Obviously, this Court determined that this supposed distinction was insufficient to render the North Carolina statute constitutionally sound.

The heart of the matter, as *Jackson* and its progeny make clear, is that the actions of the parties are irrelevant to a *Jackson* analysis. Put simply:

> the constitutionality of the penalty scheme does not depend upon what the accused does. The statute must stand or fall on its own without regard to the identity of the defendant or the course of action selected by him

(*Spillers v. Nevada*, 436 P.2d at 23 (1968)).

In *Jackson* and its progeny this Court took pains to distinguish between the constitutional ramifications of legislative and prosecutorial "coercion". As petitioners note, prosecutorial "coercion" (offering favorable sentencing treatment, even life instead of death, in exchange for guilty pleas) has been repeatedly and expressly authorized (*Corbitt v. New Jersey*, 439 U.S. 212, 218-219, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978); *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); *Parker v. North Carolina*, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970)). However, *Jackson* is not a "prosecutorial coercion" case; it simply does not address any alleged involuntariness of defendant's plea resulting from pressures brought to bear through a prosecutor's actions. In *Jackson*, this Court focused not on the effect of the actions of the prosecutor or the defendant in a particular case, but on the effect of the statute in every case.

A defendant's election to plead guilty or proceed to trial is simply irrelevant to a constitutional analysis of the statute in question. A prosecutor's laudable actions cannot save a statute that violates *Jackson*, just as a prosecutor's reprehensible actions cannot invalidate a statute that does not otherwise offend *Jackson*. Whether the prosecutor is required to consent to a plea or not (and whether the prosecutor grants or withholds such consent) has no bearing whatsoever on the constitutionality of the statute when analyzed pursuant to *Jackson*. It is not the prosecutor's discretion to offer, accept, or reject a plea that has constitutional implications, but the legislature's designation of divergent punishments for those who plead guilty and those who exercise their right to a trial (*United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968); *Parker v. North Carolina*, 397 U.S. 790, 809, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970) [Brennan, dissenting].

Petitioners also mistakenly contend that the Court of Appeals found the bifurcation of guilt/innocence and penalty trials under the New York capital statute to distinguish that statute from the Act struck down in *Jackson* (Pet. 8, 16, 17). Petitioners made the argument before the Court of Appeals and the Court of Appeals rejected it (Pet. 13a). Disingenuously, petitioners now imply that the Court of Appeals agreed with petitioners' claim when in truth, the Court merely restated petitioners' arguments to put its rejection of those arguments in context.

Bifurcation of the guilt and penalty determinations could not save the constitutionality of the New York statute, because in New York a sentencing trial is unavailable to the pleading defendant. Like the Federal Kidnaping Act, in New York, pleading defendants have no right to a separate jury for a

penalty phase trial and defendants that plead guilty have no penalty phase trial at all. In New York, a defendant who has no sentencing trial may not be sentenced to death (CPL § 400.27). By contrast, Tennessee, Louisiana, and Nevada provide for sentencing trials following a guilty plea and the statutes in those states have been distinguished from the Federal Kidnaping Act on this basis (*Conger v. Warden*, 89 Nev. 263, 510 P.2d 1359 (1973); *Tennessee v. Mann*, 1996 WL 465764 (1996); *State v. Jett*, 419 So. 2d 844 (1982)).

Further, bifurcation has no effect on the statutory disparity between the punishments available to the pleading versus the non-pleading defendant and therefore, no impact on the constitutional concerns created by such disparity. The defendant that pleads guilty in New York is guaranteed that he will not receive a death sentence by virtue of his plea; no further litigation is required. Likewise, in New York, just like under the Federal Kidnaping Act, the only way a defendant can risk death is by insisting on a jury trial, a clearly unconstitutional result. In short, the facts of this case may not be distinguished from the holding in *United States v. Jackson*, as petitioners claim, on the ground that the defendant here could not unilaterally plead guilty, or on the ground that the New York statute provides for separate guilt/innocence and penalty trials.

Petitioners also argue that the Louisiana Supreme Court (in *State v. Jett*, 419 So. 2d 844 (1982)) upheld the constitutionality of a Louisiana statute that is "just like New York's" (Pet. 20). The Louisiana statute in question (Louisiana Code of Criminal Procedure, Article 557) is not, however, "just like New York's," but differs from the New York statute in a crucial respect. In Louisiana, a defendant who pleads guilty is entitled to a penalty-phase trial before a

jury, just like a defendant who litigates guilt (*Id.*); there is no such right under the New York statute struck down in this case. Thus, in Louisiana, the pleading defendant is not assured of avoiding the death penalty as a result of his plea, whereas in New York, the pleading defendant may not be sentenced to death (CPL §§ 220.10[5][e], 220.30[3][b][vii]).

Petitioners go on to claim that there is "serious confusion" among lower courts as to the meaning of *Jackson*, and that this confusion has led Arkansas (*Ruiz v. State*, 275 Ark. 410, 630 S.W.2d 44, *cert. denied*, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982), Nevada (*Conger v. Warden*, 89 Nev. 263, 510 P.2d 1359 (1973), and Tennessee (*Tennessee v. Mann*, 1996 WL 465764 (1996)) to uphold statutory provisions similar to those struck down in New York (Pet. 20-23). Petitioners' claim of similarity between the statutes upheld in Arkansas, Nevada, and Tennessee and the statute struck down in New York is based on a misreading of the relevant statutes. The Arkansas, Nevada, and Tennessee statutes contain procedural safeguards that distinguish them both from the Federal Kidnaping Act struck down in *Jackson*, and from the New York statute.

The Nevada statute found constitutional in *Conger v. Warden* makes available, at defendant's election, a sentencing hearing before a three judge panel following a plea of guilty, unlike either the Federal Kidnaping Act or the New York capital statute (Nevada Revised Statutes 174.065[2]; 174.045). Under the Nevada statute, a defendant could be sentenced to death either by a jury (following a conviction after trial) or by a three judge panel (following a conviction after guilty plea). The Supreme Court of Nevada distinguished its statute from the Federal Kidnaping Act on this basis, noting that the applicable statutory provisions "are significantly

different . . . [here], there was no disparity in the power to punish" (*Conger v. Warden*, 89 Nev. at 265 (1973)). Unlike either the Federal Kidnaping Act or the New York statute, in Nevada, the pleading defendant was not assured of a lesser punishment simply by virtue of his plea.

The statute found constitutional by the Arkansas Supreme Court in *Ruiz v. State* does not require imposition of the death penalty, even if recommended by a jury after trial, unlike the Federal Kidnaping Act and the New York statute (*see* Arkansas Statutes Annotated §§ 41-1301-1304). In *Jackson*, this Court found it significant that, under the Federal Kidnaping Act, a defendant "stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die" (*United States v. Jackson, supra*, 390 U.S. at 581). There is no such certainty under the Arkansas statute upheld in *Ruiz*. Thus, unlike the New York statute, the Arkansas statute allows leniency to be granted not only to the pleading defendant, but also to the defendant who insists on a trial to contest his innocence, and for whom a sentencing jury recommends death.

In *Tennessee v. Mann*, an unreported Tennessee case, the defendant contended that *Jackson* was violated where, after he declined the district attorney's offer of life imprisonment in exchange for a guilty plea, the district attorney sought the death penalty. The Tennessee Court of Criminal Appeals rejected defendant's claim, reasoning that:

> . . . in *Jackson*, if the defendant pled guilty, he was completely shielded from execution. In Tennessee, however, the guilt phase and sentencing phase are separate (*see* Tenn. Code Ann. § 39-13-204 and Tenn. Code Ann. § 39-13-205). Accordingly, the

> State may seek the death penalty after a jury verdict or after a guilty plea. The *Jackson* Court suggested that there is nothing wrong with offering a life sentence in return for a guilty plea in those states where "the choice between life imprisonment and capital punishment is left to a jury in every case — regardless of how the defendant's guilt has been determined."

(*Jackson*, 390 U.S. at 582, 88 S. Ct. at 1217).

Thus, contrary to petitioners' claims, the holding in *Tennessee v. Mann* is not inconsistent with the decision in the case at bar. The Tennessee statute provides for a sentencing hearing following a guilty plea, a procedure sanctioned by this Court (*United States v. Jackson*, 390 U.S. at 582); the New York statute does not. This critical difference saves the constitutionality of the Tennessee statute, just as it dooms the constitutionality of the New York statute.

In sum, there is no "serious confusion" among lower courts as to the meaning of *Jackson*.

REASONS FOR DENYING THE WRIT

Although petitioners claim that "the conflict between *Jackson* and this Court's post-*Jackson* cases has led to serious confusion and inconsistent results around the country" (Pet. 20), in truth, the only institution confused by *Jackson* and its progeny is the New York State legislature. In the 30 years since *Jackson* was decided, no statute anywhere in the country with plea provisions identical to those in the New York State capital statute has survived a constitutional challenge. Of the 38 states with capital statutes, only New York remains unable

to draft a capital statute that does not run afoul of *Jackson*'s constitutional mandates. However, any confusion on behalf of the New York legislature concerning what *Jackson* does or does not permit has presumably been alleviated by the Court of Appeals' decision in this case, enabling the legislature to incorporate constitutionally-sound plea provisions into the capital statute, a feat successfully accomplished by every other state without resort to the further guidance from this Court that petitioners now seek.

Although petitioners contend that "numerous state and federal courts have issued inconsistent opinions, with impractical and incongruous results" (Pet. 11), in fact, there is no debate to speak of among state or federal authorities concerning the meaning of *Jackson*. Rather, the *Jackson* decision represents well-settled authority that has remained unaltered and undiminished for decades. Petitioners' claims of "inconsistent opinions" and "incongruous results" rely on a misreading of the decisions of those courts that have addressed *Jackson*-type claims.

Following *Jackson*, the highest courts in the states of North Carolina (*State v. Johnson*, 257 S.E.2d 597 (1979), New Hampshire (*State v. Johnson*, 134 N.H. 570, 595 A.2d 498 (1979), Massachusetts (*Commonwealth v. Colon-Cruz*, 393 Mass. 150, 470 N.E.2d 116 (1984)), Washington (*State v. Frampton*, 95 Wash. 2d 469, 627 P.2d 922), New Jersey (*State v. Funicello*, 286 A.2d 55), Nevada (*Spillers v. State*, 436 P.2d 18 (1968)), and Texas (*Lane v. State*, 471 S.W.2d 854 (1971)), all found statutes unconstitutional that imposed the death penalty only on those defendants who insisted on a jury trial. In addition, following *Jackson*, this Court summarily vacated nine death sentences obtained pursuant to statutes that violated *Jackson* (*Atkinson v. North Carolina*,

403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Atkinson v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Childs v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1970); *Hill v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Roseboro v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Sanders v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Williams v. North Carolina*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Thomas v. Leeke*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *Funicello v. New Jersey*, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971)). Thus, by no stretch of the imagination can the decisions of lower courts and of this Court after *Jackson* be characterized as "inconsistent".

Petitioners argue that *Jackson* should be overruled because it is irreconcilable with the later decisions of this Court that have explicitly sanctioned plea bargaining (Pet. 12-16). Petitioners' argument hinges on their misreading of *Jackson* as an "anti-plea bargaining" case (Pet. 16). Having drawn this mistaken conclusion, petitioners go on to imagine a "fundamentally irreconcilable conflict" (Pet. 11-16) between *Jackson* and the post-*Jackson* decisions of this Court that explicitly recognize and encourage plea bargaining (*see e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). There is, however, no such conflict.

The post-*Jackson* cases relied on by petitioners did speak to the prosecutor's right to seek negotiated pleas, specifically condoning that practice, a result distinct from, and in no way contrary to, the result in *Jackson*. *Jackson* didn't address the

prosecutor's authority to negotiate a plea, but rather, limited the legislature's ability to mandate disparate punishments for the same offense by rewarding only those defendants that agree to waive their constitutional rights.

Petitioners' claim that the holding of *Jackson* is "fundamentally irreconcilable" with this Court's post-*Jackson* decisions (Pet. 11-16) further rests on their mistaken assumption that *Jackson* put the practice of plea bargaining in question. However, the *Jackson* decision didn't address the practice of bargaining between the prosecutor and the defendant; it placed limits on the actions of the legislature, not the actions of the prosecutor. Encouraging pleas, even through offers of substantial leniency in exchange for the waiver of the right to trial is constitutionally permissible, so long as the accused is free to accept or reject the prosecution's offer (*Bordenkircher v. Hayes,* 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604, *rehearing denied,* 435 U.S. 918, 98 S. Ct. 1477, 55 L. Ed. 2d 511 (1978); *see also Corbitt v. New Jersey*, 439 U.S. 212, 218-219, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978); *Brady v. United States*, 397 U.S. 742, 751, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)). However,

> there is a vast difference between the settlement of litigation through negotiation between counsel for the parties, and a state statute such as is involved in the present case

(*Corbitt v. New Jersey*, 439 U.S. at 227 [Stewart, concurring]).

Petitioners point to this Court's decision in *Corbitt v. New Jersey*, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978) as an example of a decision in "irreconcilable conflict"

with *Jackson* (Pet. 14-16). The conflict, however, is wholly of petitioners' making. In *Corbitt*, this Court rejected defendant's claim that New Jersey's statute violated *Jackson*. The challenged statute required that a defendant convicted after trial receive the maximum permissible sentence (life imprisonment), whereas a defendant who pleaded *non vult* (the New Jersey equivalent of a *nolo contendere* plea) could receive either a life sentence or a lesser term of years (N.J.S.A. §§ 2A:113-1–2A:113-4). This Court distinguished the New Jersey statute under which Corbitt pled, reasoning that:

> In *Jackson*, any risk of suffering the maximum penalty could be avoided by pleading guilty . . . [however] . . . New Jersey does not reserve the maximum punishment for murder for those who insist on a jury trial

(*Corbitt v. New Jersey*, 439 U.S. at 217).

Thus, this Court found that the New Jersey statute did not violate *Jackson* because in New Jersey, the risk of receiving the maximum punishment was not avoided by pleading *non vult*, a result presaged by the *Jackson* decision itself, in which this Court suggested that if the Federal Kidnaping Act provided a mechanism whereby Jackson could receive the maximum sentence after a plea as well as after trial, the Act would pass constitutional muster (*United States v. Jackson, supra*, 390 U.S. at 582).

Thus, *Corbitt* did not touch upon the core issue in *Jackson* — "the legislative imposition of a markedly more severe penalty if a defendant asserts his right to a jury trial and a concomitant legislative promise of leniency of he pleads guilty"; rather, it dealt only with the "very different . . . give

and take negotiation common in plea bargaining between the prosecution and the defense" where both parties arguably possess relatively equal bargaining power (*Parker v. North Carolina*, 397 U.S. 790, 809, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970) [Brennan, dissenting]). Thus, while the decision in *Corbitt* perhaps clarifies what *Jackson* does *not* stand for, it does not narrow or limit the central premise of *Jackson* in any way, nor is it "utterly irreconcilable" with *Jackson*, as petitioners claim.

Petitioners apparently argue that this Court's post-*Jackson* cases would permit a statutory sentencing disparity for a conviction for the same offense depending on whether an accused exercises or waives his right to trial (Pet. 16-20). Just as *Jackson* didn't condemn plea bargaining, the post-*Jackson* cases cited by petitioners don't condone a statutorily-imposed sentencing disparity which turns on whether a defendant exercises or waives his constitutional rights. In the post-*Jackson* cases upon which petitioners rely, no such statutory sentencing disparity existed. Instead, (and unlike the case at bar) the harshest punishment was not reserved only for those defendants that insisted on their right to trial or to not plead guilty.

For example, Nevada, Louisiana, and Tennessee provide a penalty trial following a conviction by either plea or trial, a solution that does not "penalize a person's reliance on his constitutional rights" and is constitutionally sound (*see, e.g., Conger v. Warden*, 89 Nev. 263, 510 P.2d 1359 (1973); *Tennessee v. Mann*, 1996 WL 465764; *State v. Jett*, 419 So. 2d 844 (1982)). On the other hand, where (as in New York) a statutory scheme provides that a defendant who pleads guilty cannot receive the death penalty, a defendant may only avail himself of his Sixth Amendment right to a jury trial and Fifth

Amendment right against self incrimination by risking death, a constitutionally impermissible result (*see, e.g., State v. Johnson*, 257 S.E.2d 597 (1979); *State v. Johnson*, 134 N.H. 570, 595 A.2d 498 (1991); *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 470 N.E.2d 116 (1984); *State v. Frampton*, 95 Wash. 2d 469, 627 P.2d 922 (1981); *State v. Funicello*, 286 A.2d 55 (1972); *Spillers v. State*, 436 P.2d 18 (1968); *Lane v. State*, 471 S.W.2d 854 (1971)). Petitioners refuse to acknowledge that it is the statutory disparity in the punishment available to the pleading versus the non-pleading defendant that renders such statutes unconstitutional:

> [t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort (*see, North Carolina v. Pearce*, 395 U.S. 711, 738, 89 S. Ct. 2072, 23 L. Ed. 2d 656), and for . . . the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional" (*Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33, n.20, 93 S. Ct. 1977, 36 L. Ed. 2d 714; *see United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138).

(*Bordenkircher v. Hayes, supra*).

In the three decades since *Jackson* was decided, no statute incorporating such a disparity has survived a *Jackson* challenge, just as no statue lacking such a disparity has been invalidated in reliance on *Jackson*. Therefore, there is no authority for petitioners' contention that there is divergence in the opinions of courts construing statutes subjected to *Jackson* claims.

Contrary to petitioners' claims, there is no need to grant review to resolve the question of whether *Jackson* is applicable to modern capital statutes (Pet. 16-20). Although petitioners argue that *Jackson* is no longer viable given the changes in capital jurisprudence, the supposed distinctions between the Federal Kidnaping Act struck down in *Jackson* and the modern capital statutes that petitioners cite have already been roundly rejected. Petitioners argue that in *Jackson* the defendant had a unilateral right to plead guilty, a right denied to defendants under modern capital statutes, and that *Jackson* is not applicable to statutes that provide for bifurcated guilt/innocence and punishment determinations (Pet. 17). As noted above however, petitioners' claim that the defendant in *Jackson* could unilaterally plead guilty is simply false. Judicial consent to defendant's plea was required under the Federal Kidnaping Act in *Jackson*, just as it is under modern capital statutes, New York's included. In addition, whether a statute provides for bifurcation of guilt/innocence and penalty determinations is not a distinction sufficient to rescue an otherwise unconstitutional statute from a *Jackson* challenge. Further, any question concerning the application of *Jackson* to capital statutes is moot, except in New York, since every other state with a capital statute has managed to successfully conform its statute to the requirements of *Jackson*.

Finally, petitioners imply that *Jackson* should be overruled because it was wrongly decided (Pet. 14). Even if true, that fact alone would not provide sufficient cause to overrule the *Jackson* decision (*Mitchell v. United States*, __ U.S.__, __ S. Ct. __, __ L. Ed. 2d __ [1999 WL 181164 4/5/99], Scalia, J., dissenting).

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

A. This Court Should Reexamine *United States v. Jackson* and Determine Whether it is Applicable to Modern Capital Statutes.

Employing circular reasoning, respondents argue that *certiorari* should be denied. In their view, because the New York Court of Appeals felt constrained to apply the rule of *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1211, 20 L. Ed. 2d 138 (1968) to a bifurcated capital statute — something that this Court has never done — *Jackson*'s viability in modern capital jurisprudence should not be reexamined. The viability of *Jackson* in the modern capital era is the precise issue that this Court should examine. Notwithstanding respondents' arguments to the contrary, this Court's post-*Jackson* jurisprudence regarding plea bargaining has eroded *Jackson*'s legal underpinnings. *See, e.g., Baker v. State*, 310 Ark. 223, 225, 884 S.W.2d 603, 604 (1994); *Ruiz & Denton v. State*, 275 Ark. 410, 630 S.W.2d 44, *cert. denied*, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982); *see also Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998) ("The [Supreme] Court expressly limited *Jackson* two years later in *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 [1970]"). In light of the legally and logically unsound consequences that result from applying *Jackson* to modern bifurcated capital statutes, *Jackson* should be either overruled or expressly limited by this Court.

Underlying respondents' argument is the theme that, even under a bifurcated capital statute, a capital defendant nonetheless risks a different maximum punishment if he or she declines to plead guilty and proceeds to trial. That argument begs the issue presented by the petition. For *Jackson* involved a *unitary* capital statute, without separate

guilt and penalty phases. This Court has never decided whether *Jackson* should also apply to a post-*Gregg bifurcated* capital punishment statute, by which a defendant can exercise the right to a jury trial on the issue of guilt or innocence, and still agree to accept a sentence of less than death after a conviction.[1] One commentator has noted that *Jackson* was motivated by the dilemma this Court faced, over thirty years ago, concerning the propriety of judicial abolition of capital punishment as it then existed. *See* Douglas A. Poe, *Capital Punishment Statutes In The Wake of United States v. Jackson: Some Unresolved Questions*, 37 Geo. Wash. L. Rev. 719, 744-45 (1969). Several years later, of course, this Court resolved the general question of whether capital punishment is constitutional. *See Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Thus, *Jackson*'s viability with respect to modern capital jurisprudence should be examined.

Respondents completely overlook the gravamen of the petition. In the years since *Jackson* was decided, this Court has repeatedly and expressly endorsed plea bargaining in criminal cases, notwithstanding that defendants would be faced with a difficult choice of risking more severe punishment by asserting their trial rights. Yet in *Jackson*, this Court appears to have held that the imposition of these same choices is constitutionally impermissible when they are authorized by statute.[2]

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1. A capital defendant has no federal constitutional right to a jury trial at a sentencing or penalty phase. *See Lockett v. Ohio*, 438 U.S. 586, 603, 98 S. Ct. 2954, 2964, 57 L. Ed. 2d 973 (1978); *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S. Ct. 2960, 2966, 49 L. Ed. 2d 913 (1976).

2. Respondents maintain that *Jackson* was not an "anti-plea bargaining" case. Yet the practical effect of *Jackson*, as evidenced by the Court of Appeals' decision, is "anti-plea bargaining."

Thus, *Jackson* and this Court's post-*Jackson* jurisprudence cannot in logic or in law be reconciled. *Jackson* prohibits confronting a defendant with the risk of a death sentence when disparate penalties are authorized for the same crime by statute. In contrast, the cases culminating with *Corbitt v. New Jersey*, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978), permit a defendant to risk a more severe penalty by exercising constitutional trial rights, since, as a practical matter, plea bargaining necessarily involves the risk of a defendant being subject to more severe punishment by asserting the same constitutional trial rights. Plea bargaining negotiations invariably present defendants with a choice between pleading guilty to a lesser crime with a less severe punishment or standing trial for a greater crime with a more severe maximum punishment. Respondents do not and could not seriously contend that such a choice violates *Jackson*. Yet, taking *Jackson*'s rationale to its logical conclusion, any statutory framework which presents the possibility of disparate maximum sentences depending on whether the defendant asserts constitutional trial rights should violate *Jackson*, even if the punishments are for different crimes or degrees of crimes.

Respondents attempt to explain away this legal incongruity by claiming that although a prosecutor could accomplish a plea bargain which has the identical effect of providing the defendant with the possibility of avoiding the death penalty by pleading guilty, the legislature cannot statutorily provide for the same result. *See* Respondent Connell's brief in opposition at 16-17; Respondents Hale and Mateo's brief in opposition at 5-6. Thus, a statutory disparity in the power to punish is unconstitutional under *Jackson*; yet a practical disparity in the power to punish, which is the linchpin of plea bargaining as explained by

this Court after *Jackson* is constitutional. *Corbitt*, however, explicitly held that just as a prosecutor can charge a defendant with the maximum level of offense and secure a conviction, despite the prosecutor's power to offer a reduced plea, the legislature may also "openly provide for the possibility of leniency in return for a plea." 439 U.S. at 224, 99 S. Ct. at 498.

Respondents Hale and Mateo state in their brief in opposition (page 7) that

> [t]rue plea-bargaining contemplates, as a necessary element, that a defendant will be faced with the difficult choice whether to risk a more severe punishment by pleading not guilty.

Yet their entire argument is that *Jackson* holds that the Constitution prohibits a statutory scheme which does just that. Respondents Hale and Mateo thus completely undercut their argument that *Jackson* and this Court's post-*Jackson* jurisprudence relating to plea bargaining are in harmony. Petitioners ask this Court to reconcile this inconsistency by reexamining the legal underpinnings of the *Jackson* precedent in light of the "sea change" in capital jurisprudence since the time of *Jackson*.

Again, employing circular logic, respondents claim that because the Court of Appeals concluded that only this Court could determine that *Jackson* was satisfied by a bifurcated capital statute, it is unnecessary for this Court to address the issue. This again begs the question of how a state may devise a capital statutory scheme which comports with *Jackson*: May a state enact a bifurcated scheme that affords a capital defendant the opportunity to exercise constitutional trial rights and still negotiate an agreement for a sentence less than death? Or, must a capital statute provide for the

possibility of a death sentence regardless of how guilt was determined or prohibit guilty pleas in capital cases unless the death penalty is waived? *Jackson* left this exact question open for future consideration. The issue is now squarely before this Court.

Respondents also argue that because most other jurisdictions have elected a different way of dealing with *Jackson*, New York's statute must be wrong. Merely because most jurisdictions that have enacted capital punishment laws have chosen one method of complying with *Jackson* does not render that method the sole constitutional way of doing so. *See Pulley v. Harris*, 465 U.S. 37, 44-45, 104 S. Ct. 871, 876, 79 L. Ed. 2d 29 (1984) ("We take statutes as we find them. To endorse the statute as a whole is not to say that anything different is unacceptable"); *Gregg v. Georgia*, 428 U.S. at 195, 96 S. Ct. at 2935 ("We do not intend to suggest that only the above-described procedures [regarding capital punishment] would be permissible"). This Court did not hold in *Jackson* that there are one or two exclusive methods by which a state's capital punishment law can pass constitutional scrutiny. New York has fashioned a plea statute that adopts two constitutional provisions: a provision that permits negotiated plea bargains, and a provision, specifically found constitutional in *Jackson*, that mandates a jury trial in all capital cases. The New York Court of Appeals felt constrained to strike this amalgam of constitutional provisions. But, the Court of Appeals invited this Court to address the issue, and so do Petitioners.

B. The Decision of the New York Court of Appeals Has Impeded the Functioning of Capital Punishment and Plea Bargaining in Capital Cases.

Contrary to respondents Hale and Mateo's contention (Brief in Opposition, page 4), the decision of the New York Court of Appeals has had an adverse impact on the functioning of capital punishment in New York. New York defendants, who could not plead guilty without the approval of the prosecution and the court under the capital guilty plea provisions, may now plead guilty as of right to an entire indictment which includes a charge of first degree murder, without court or prosecutorial approval pursuant to N.Y. Crim. Proc. Law § 220.10(2). A defendant may thus completely avoid a potential capital sentence by pleading guilty to first degree murder charges after an indictment has been filed but before the prosecution has the opportunity to decide whether to file a notice of intent to seek the death penalty, regardless of individual circumstances.[3] Hence, the remedy fashioned by the Court of Appeals presents a far greater risk of "needlessly" encouraging guilty pleas in capital murder cases by providing potential capital defendants with the opportunity to hastily plead guilty to the entire indictment before the prosecutor can determine whether capital punishment is appropriate.

In the case of *People v. Kendall Francois* (N.Y. Co. Ct., Dutchess County, Feb. 11, 1999), the defendant was

---

3. Indeed, the Court of Appeals may well have encouraged more guilty pleas by capital defendants than allegedly would occur had the capital guilty plea provisions been upheld, in authorizing guilty pleas by capital defendants to crimes other than first degree murder, even though the notice of intent to seek the death penalty is not withdrawn. *Matter of Hynes v. Tomei*, 92 N.Y.2d 613, 629, 684 N.Y.S.2d 177, 185 (1998).

charged with the murders of eight women. On December 23, 1998, the day after the Court of Appeals' decision, the defendant's attorneys demanded that the defendant be brought to court, even though his case was not on the court's calendar, solely to enter a guilty plea to the entire indictment, and thus, avoid a potential death sentence. On December 24, 1998, the Dutchess County District Attorney filed a notice of intent to seek the death penalty, even though he had previously announced that he would not decide whether to do so until January of 1999.[4] The defendant's post-notice application to plead guilty to the indictment as of right was not effectuated.[5] However, had the Court of Appeals not applied *Jackson* and upheld the capital guilty plea provisions, *Francois* could not have attempted to avoid a potential death sentence by hastily attempting to plead guilty to the indictment as of right. The District Attorney would not have been prematurely forced to seek the death penalty. The parties would, in any case, have remained free to consider negotiating a plea of guilty to first degree murder in exchange for a sentence of life without parole, which the Court of Appeals' ruling has determined to be unconstitutional.

Two other cases which postdate the Court of Appeals' decision also illustrate its far-reaching effect. In *People v. Nicholson McCoy*, the Suffolk County District Attorney filed a notice of intent to seek the death penalty on December 23, 1998, one day after the Court of Appeals' decision.

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4. Under New York law, a prosecutor has 120 days from the date the defendant is arraigned on an indictment charging first degree murder to determine whether to seek the death penalty. N.Y. Crim. Proc. Law § 250.40(2).

5. A copy of the unreported decision of the Dutchess County Court in *Francois* will be provided to this Court upon request.

McCoy confirms the Court of Appeals' prediction that striking the plea provisions "may well have an ironic twist in that capital defendants will have fewer opportunities to avoid the possibility of the death penalty." *Matter of Hynes v. Tomei*, 92 N.Y.2d at 629, 684 N.Y.S.2d at 185.

In *People v. David Van Dyne*, 1999 N.Y. Misc. LEXIS 11 (N.Y. Co. Ct., Monroe County, Jan. 20, 1999), the court accepted a conditional plea to a charge of first degree murder in exchange for a sentence of life imprisonment without parole. The prosecutor agreed to withdraw the notice of intent to seek the death penalty. However, the notice could be reinstated if the defendant either withdrew his plea or otherwise failed to abide by the terms of the agreement. Since New York law prohibits a prosecutor from refiling a notice of intent to seek the death penalty once it is withdrawn, *see* N.Y. Crim. Proc. Law § 250.40(4), it is far from clear whether such conditional plea arrangements would be upheld on appeal. Had the Court of Appeals not applied *Jackson* to the plea provisions, however, a conditional plea arrangement would not have been necessary in *Van Dyne*.

Respondents have thus misconstrued the role that the capital guilty plea provisions play in the administration of capital cases in New York. The provisions allow for individualized, case-by-case prosecutorial discretion and plea bargaining after a notice of intent to seek the death penalty has been filed, in cases where it becomes apparent that capital punishment is inappropriate.[6] The Court of

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6. This Court has observed that "a capital punishment system that did not allow for leniency 'would be totally alien to our notions of criminal justice.' " (*McCleskey v. Kemp*, 481 U.S. 279, 312, 107 S. Ct. 1756, 1778, 95 L. Ed. 2d 262 (1987); *Gregg v. Georgia*, 428 U.S. at 153, 200, n.50, 96 S. Ct. 2909, 2938, n.50).

Appeals has eliminated this discretion, unless the prosecutor withdraws the notice of intent to seek the death penalty or permits the defendant to plead guilty to a crime other than Murder in the First Degree.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant the writ of *certiorari* to review the decision and judgment of the Court of Appeals of the State of New York and decide the important constitutional issues presented by this case.

Respectfully submitted,

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* *Counsel of Record for Petitioners*

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
APR 23 1999
CLERK

(4)

No. 98-1533

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

On Petition for a Writ of Certiorari
to the Court of Appeals of the State of New York

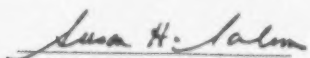
RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The respondent, Michael Shane Hale, asks leave to file the attached Brief in Opposition to Certiorari without prepayment of costs and to proceed *in forma pauperis*. In the trial and appellate courts of New York, respondent was allowed to proceed as a poor person and was represented by the Capital Defender Office of New York. Such counsel has agreed to represent respondent in this Court without expense to him. Respondent's affidavit in support of this motion is attached hereto.

50 pp

Date: New York, New York
April 21, 1999

Respectfully submitted,



SUSAN H. SALOMON
Counsel of Record

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915 Broadway
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No. 98-1533

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Intervenor-Petitioner.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss.:

I, Michael Hale, being first duly sworn according to law, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to the redress I seek.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount (Past 12 months)**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	N/A	$ 0	N/A
Self-employment	$ 0	N/A	$ 0	N/A
Income from real property (such as rental income)	$ 0	N/A	$ 0	N/A
Interest and dividends	$ 0	N/A	$ 0	N/A
Gifts	$ 10	N/A	$ 10	N/A
Alimony	$ 0	N/A	$ 0	N/A
Child Support	$ 0	N/A	$ 0	N/A
Retirement (such as social security, pensions, annuities, insurance)	$ 0	N/A	$ 0	N/A
Disability (such as social security, insurance payments)	$ 0	N/A	$ 0	N/A
Unemployment payments	$ 0	N/A	$ 0	N/A
Public-assistance (such as welfare)	$ 0	N/A	$ 0	N/A
Other (specify):_____	$ 0	N/A	$ 0	N/A
Total monthly income:	$ 10	N/A	$ 10	N/A

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes and other deductions.)

Employer	**Address**	**Dates of Employment**	**Gross monthly pay**
NONE			$

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes and other deductions.)

Employer	**Address**	**Dates of Employment**	**Gross monthly pay**
N/A			$

4. How much cash do you and your spouse have? $ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	**Type of account**	**Amount-you**	**Amount- your spouse**

See attached certified statement of institutional account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. NONE

□ Home
Value $_____

□ Other real estate
Value $_____

□ Motor Vehicle #1
Year, make & model _____
Value $_____

□ Motor Vehicle #2
Year, make & model _____
Value $_____

□ Other assets
Description _____
Value $_____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse	**Amount owed-you**	**Amount owed-your spouse**
NONE	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	**Relationship**	**Age**
N/A	_____	_____

8. Estimate the average monthly expenses for you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? □ Yes □ No Is property insurance included? □ Yes □ No	$ 0	N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	N/A
Home maintenance (repairs and upkeep)	$ 0	N/A
Food	$ 0	N/A
Clothing	$ 0	N/A
Laundry and dry-cleaning	$ 0	N/A

Medical and dental expenses	$ 0	N/A
Transportation (not including motor vehicle payments)	$ 0	N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 0	N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	N/A
Life	$ 0	N/A
Health	$ 0	N/A
Motor Vehicle	$ 0	N/A
Other: _____	$ 0	N/A
Taxes (not deducted from wages or included in mortgage payments) (Specify):_____	$ 0	N/A
Installment payments		
Motor Vehicle	$ 0	N/A
Credit card(s)	$ 0	N/A
Department store(s)	$ 0	N/A
Other: _____	$ 0	N/A
Alimony, maintenance, and support paid to others	$ 0	N/A
Regular expenses for operation of business, profession or farm (attach detailed statement)	$ 0	N/A
Other (specify): _____	$ 0	N/A
Total monthly expenses:	$ 0	N/A

9. Do you expect any changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

□ Yes ■ No If yes, describe on attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including completion of this form?

□ Yes ■ No If yes, how much? $_____

If yes, state the attorney's name address and telephone number:

_____

_____

_____

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including completion of this form?

□ Yes ■ No If yes, how much? $_____

If yes, state the person's name address and telephone number:

_____

_____

_____

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am currently incarcerated serving an indeterminate sentence of fifty years to life.

13. State the address of your legal residence.

New York Department of Corrections

Manhattan Detention Complex

125 White Street

New York, NY 10013

Your daytime phone number: N/A Your age: 26

Your years of schooling: 12 Your social-security number: 404-06-0401

I swear or affirm under penalty of perjury that the foregoing is true and correct.

Michael S. Hale
MICHAEL HALE

Duly witnessed and sworn to
before me, a Notary Public,
this 24 day of [illegible], 1999

[illegible]

SONYA A. ZOGHLIN
Notary Public, State of New York
No. 02ZO5061314
Qualified in Kings County
Commission Expires June 03

CORRECTION DEPARTMENT
CITY OF NEW YORK
MANHATTAN DETENTION COMPLEX

FAX MACHINE ROUTING INSTRUCTIONS

DELIVER TO: Susan Salomon
First Deputy Capital Defender
Capital Defender office

FROM: Jeanette Taylor
Business Manager
MDC

PLEASE CALL THE FOLLOWING TELEPHONE NUMBER IF THERE IS A PROBLEM IN TRANSMISSION

212 / 225 -- 1346

PRIORITY (CHECK APPROPRIATE BOX)

IMMEDIATE ☑ IMPORTANT ☑ ROUTINE ☐

THIS MATERIAL CONSISTS OF 9 PAGES INCLUDING THIS PAGE

REMARKS: Re: Michael Hale - Institutional Account as of 6/1/98 to 1/25/99. (Per your letter 1/20/99.)

01/25/99 19:01
MDC

The City of New York
Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
06/01/98	WITHDRAWAL	CLIFF GRIGGS	1046876709	-115.00	48.58
06/01/98	TELEPHONE	SUMM. IN 1046862828	1046877815	-.49	48.09
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06/01/98	TELEPHONE	SUMM. IN 1046862828	1046893621	-.49	47.23
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06/23/98	PAYROLL	24.09S BACK PAY	1047679281	19.60	175.86
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06/24/98	COMMISSARY		1047737661	-50.45	124.92
06/29/98	TELEPHONE	SUMM. IN 1047915713	1047947624	-.33	124.59
06/29/98	TELEPHONE	SUMM. IN 1047915713	1047948617	-.49	124.10

The City of New York
Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 90?708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
06/30/98	PAYROLL	26.09S SPA & HKA	1047931475	19.60	143.70
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07/22/98	WITHDRAWAL	COLT STUDIO	1048762876	-12.00	51.46
07/23/98	MAIL DEPOSIT		1048785586	20.00	71.46
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07/30/98	TELEPHONE	SUMM. IN 1049030504	1049063914	-.49	24.91
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07/31/98	TELEPHONE	SUMM. IN 1049068033	1049106904	-.49	24.04
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08/01/98	TELEPHONE	SUMM. IN 1049111563	1049129603	-.49	23.18
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08/02/98	TELEPHONE	SUMM. IN 1049150441	1049177760	-.46	21.70

01/25/99 19:01
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Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
08/03/98	TELEPHONE	SUMM. IN 1049185466	1049216686	-.49	21.21
08/04/98	PAYROLL	31.09S HKA/SPA	1049203203	19.60	40.81
08/04/98	TELEPHONE	SUMM. IN 1049221727	1049256571	-.49	40.32
08/05/98	MAIL DEPOSIT	753678MDC	1049268706	20.00	60.32
08/05/98	COMMISSARY		1049271017	-12.64	47.68
08/05/98	TELEPHONE	SUMM. IN 1049258348	1049279253	-.49	47.19
08/05/98	TELEPHONE	SUMM. IN 1049258348	1049280824	-.37	46.82
08/06/98	TELEPHONE	SUMM. IN 1049300405	1049317456	-.33	46.49
08/06/98	TELEPHONE	SUMM. IN 1049300405	1049324417	-.33	46.16
08/06/98	TELEPHONE	SUMM. IN 1049300405	1049327379	-.38	45.78
08/06/98	TELEPHONE	SUMM. IN 1049300405	1049328076	-.37	45.41
08/07/98	TELEPHONE	SUMM. IN 1049340400	1049381821	-.33	45.08
08/08/98	TELEPHONE	SUMM. IN 1049390535	1049406090	-.49	44.59
08/08/98	TELEPHONE	SUMM. IN 1049390535	1049406405	-.37	44.22
08/08/98	TELEPHONE	SUMM. IN 1049390535	1049418751	-.34	43.88
08/10/98	TELEPHONE	SUMM. IN 1049464423	1049482387	-.49	43.39
08/10/98	TELEPHONE	SUMM. IN 1049464423	1049482621	-.37	43.02
08/11/98	PAYROLL	32.09S SPA/HKA	1049480522	19.60	62.62
08/11/98	PAYROLL	29.09S BACKPAY	1049490689	19.60	82.22
08/11/98	TELEPHONE	SUMM. IN 1049503578	1049528361	-.33	81.89
08/12/98	COMMISSARY		1049544697	-11.84	70.05
08/12/98	TELEPHONE	SUMM. IN 1049534200	1049568433	-.33	69.72
08/12/98	TELEPHONE	SUMM. IN 1049534200	1049569373	-.37	69.35
08/12/98	TELEPHONE	SUMM. IN 1049534200	1049570312	-.38	68.97
08/13/98	TELEPHONE	SUMM. IN 1049576293	1049602148	-.49	68.48
08/15/98	TELEPHONE	SUMM. IN 1049667264	1049688398	-.49	67.99
08/15/98	TELEPHONE	SUMM. IN 1049667264	1049688663	-.37	67.62
08/16/98	TELEPHONE	SUMM. IN 1049699292	1049728612	-.49	67.13
08/16/98	TELEPHONE	SUMM. IN 1049699292	1049728960	-.37	66.76
08/17/98	TELEPHONE	SUMM. IN 1049738417	1049772992	-.33	66.43
08/17/98	TELEPHONE	SUMM. IN 1049738417	1049773653	-.40	66.03
08/18/98	PAYROLL	0.33.09S SPA HKA	1049756738	19.60	85.63
08/18/98	TELEPHONE	SUMM. IN 1049776365	1049796685	-.49	85.14
08/18/98	TELEPHONE	SUMM. IN 1049776365	1049809543	-.33	84.81
08/19/98	COMMISSARY		1049822636	-9.24	75.57
08/19/98	TELEPHONE	SUMM. IN 1049813771	1049837818	-.49	75.08
08/20/98	TELEPHONE	SUMM. IN 1049854295	1049878424	-.34	74.74
08/20/98	TELEPHONE	SUMM. IN 1049854295	1049878501	-.33	74.41
08/21/98	TELEPHONE	SUMM. IN 1049896643	1049905901	-.43	73.98
08/21/98	TELEPHONE	SUMM. IN 1049896643	1049909276	-.43	73.55
08/23/98	TELEPHONE	SUMM. IN 1049979681	1050009973	-.49	73.06

The City of New York
Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
08/24/98	TELEPHONE	SUMM. IN 1050014895	1050033210	-.49	72.57
08/24/98	TELEPHONE	SUMM. IN 1050014895	1050050109	-.49	72.08
08/25/98	PAYROLL	34.09S HKA SPA	1050056646	19.60	91.68
08/25/98	TELEPHONE	SUMM. IN 1050055030	1050077934	-.49	91.19
08/26/98	COMMISSARY		1050098869	-20.17	71.02
08/26/98	COMMISSARY		1050098880	-2.00	69.02
08/28/98	TELEPHONE	SUMM. IN 1050175748	1050217397	-.36	68.66
08/31/98	TELEPHONE	SUMM. IN 1050294265	1050329152	-.49	68.17
09/01/98	PAYROLL	0.35 9 S SPA & HKA	1050312537	19.60	87.77
09/01/98	TELEPHONE	SUMM. IN 1050334491	1050364072	-.40	87.37
09/02/98	COMMISSARY		1050384961	-8.09	79.28
09/04/98	TELEPHONE	SUMM. IN 1050453182	1050467779	-.33	78.95
09/04/98	TELEPHONE	SUMM. IN 1050453182	1050480661	-.49	78.46
09/04/98	TELEPHONE	SUMM. IN 1050453182	1050482824	-.37	78.09
09/04/98	TELEPHONE	SUMM. IN 1050453182	1050496723	-.49	77.60
09/04/98	TELEPHONE	SUMM. IN 1050453182	1050497147	-.37	77.23
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050513345	-.49	76.74
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050537948	-.37	76.37
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050538025	-.33	76.04
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050538095	-.33	75.71
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050538297	-.33	75.38
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050539659	-.47	74.91
09/07/98	TELEPHONE	SUMM. IN 1050580771	1050599019	-.37	74.54
09/08/98	TELEPHONE	SUMM. IN 1050611565	1050622307	-.47	74.07
09/08/98	TELEPHONE	SUMM. IN 1050611565	1050641582	-.49	73.58
09/08/98	TELEPHONE	SUMM. IN 1050611565	1050641917	-.37	73.21
09/09/98	PAYROLL	36.09S SPA/HKA	1050624886	19.60	92.81
09/09/98	COMMISSARY		1050655156	-19.70	73.11
09/09/98	TELEPHONE	SUMM. IN 1050647474	1050680295	-.49	72.62
09/09/98	TELEPHONE	SUMM. IN 1050647474	1050683208	-.38	72.24
09/10/98	MAIL DEPOSIT		1050715066	20.00	92.24
09/11/98	TELEPHONE	SUMM. IN 1050730601	1050772144	-.49	91.75
09/12/98	TELEPHONE	SUMM. IN 1050780325	1050803674	-.49	91.26
09/13/98	TELEPHONE	SUMM. IN 1050817318	1050827305	-.37	90.89
09/15/98	PAYROLL	37.09S HKA/SPA	1050880899	19.60	110.49
09/15/98	TELEPHONE	SUMM. IN 1050892512	1050906788	-.49	110.00
09/15/98	TELEPHONE	SUMM. IN 1050892512	1050909190	-.33	109.67
09/15/98	TELEPHONE	SUMM. IN 1050892512	1050909356	-.34	109.33
09/16/98	COMMISSARY		1050937303	-21.98	87.35
09/16/98	TELEPHONE	SUMM. IN 1050925681	1050954635	-.34	87.01
09/17/98	TELEPHONE	SUMM. IN 1050966624	1051007113	-.49	86.52

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The City of New York
Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
09/18/98	TELEPHONE	SUMM. IN 1051008845	1051046370	-.34	86.18
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051075860	-.45	85.73
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051087772	-.33	85.40
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051087875	-.33	85.07
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051087951	-.33	84.74
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051088362	-.38	84.36
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051088457	-.33	84.03
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051088720	-.33	83.70
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051089368	-.40	83.30
09/20/98	TELEPHONE	SUMM. IN 1051093583	1051095140	-.33	82.97
09/20/98	TELEPHONE	SUMM. IN 1051093583	1051095188	-.33	82.64
09/20/98	TELEPHONE	SUMM. IN 1051093583	1051120406	-.40	82.24
09/20/98	TELEPHONE	SUMM. IN 1051093583	1051123663	-.37	81.87
09/20/98	TELEPHONE	SUMM. IN 1051093583	1051123922	-.34	81.53
09/21/98	TELEPHONE	SUMM. IN 1051128865	1051138528	-.38	81.15
09/21/98	TELEPHONE	SUMM. IN 1051128865	1051169628	-.47	80.68
09/22/98	PAYROLL	38.09S HKA/SPA	1051151021	19.60	100.28
09/22/98	TELEPHONE	SUMM. IN 1051169739	1051187804	-.49	99.79
09/22/98	TELEPHONE	SUMM. IN 1051169739	1051195379	-.36	99.43
09/22/98	TELEPHONE	SUMM. IN 1051169739	1051197744	-.49	98.94
09/24/98	TELEPHONE	SUMM. IN 1051246481	1051255167	-.37	98.57
09/24/98	WITHDRAWAL	ROJEANIA GODSEY-ERB	1051268278	-10.00	88.57
09/24/98	WITHDRAWAL	COLT STUDIO	1051269364	-26.25	62.32
09/25/98	COMMISSARY		1051292967	-12.48	49.84
09/26/98	TELEPHONE	SUMM. IN 1051333118	1051367349	-.49	49.35
09/26/98	TELEPHONE	SUMM. IN 1051333118	1051367737	-.37	48.98
09/29/98	PAYROLL	39.09S HKA/SPA	1051426422	19.60	68.58
09/30/98	TELEPHONE	SUMM. IN 1051487237	1051528093	-.33	68.25
09/30/98	TELEPHONE	SUMM. IN 1051487237	1051528836	-.33	67.92
10/02/98	MAIL DEPOSIT	755215MDC	1051579762	60.00	127.92
10/02/98	COMMISSARY		1051581769	-25.25	102.67
10/02/98	TELEPHONE	SUMM. IN 1051571143	1051614139	-.49	102.18
10/03/98	TELEPHONE	SUMM. IN 1051617323	1051629665	-.49	101.69
10/04/98	TELEPHONE	SUMM. IN 1051634308	1051664069	-.40	101.29
10/06/98	PAYROLL	40.09S HKA/SPA	1051704097	19.60	120.89
10/06/98	TELEPHONE	SUMM. IN 1051715482	1051751382	-.46	120.43
10/07/98	TELEPHONE	SUMM. IN 1051753209	1051780610	-.49	119.94
10/08/98	WITHDRAWAL	OUT/MAGZ.	1051809648	-12.95	106.99
10/09/98	COMMISSARY		1051827839	-9.66	97.33
10/09/98	COMMISSARY CORR.		1051827842	4.56	101.89
10/09/98	COMMISSARY		1051827846	-2.50	99.39

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MDC Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
10/14/98	PAYROLL	41.09S HKA/SPA	1052002047	19.60	118.99
10/15/98	COMMISSARY		1052073039	-21.82	97.17
10/15/98	COMMISSARY		1052073047	-1.47	95.70
10/16/98	MAIL DEPOSIT	755331MDC	1052116456	20.00	115.70
10/16/98	TELEPHONE	SUMM. IN 1052107226	1052147952	-.33	115.37
10/16/98	TELEPHONE	SUMM. IN 1052107226	1052148061	-.33	115.04
10/16/98	TELEPHONE	SUMM. IN 1052107226	1052148269	-.33	114.71
10/16/98	TELEPHONE	SUMM. IN 1052107226	1052148711	-.33	114.38
10/16/98	TELEPHONE	SUMM. IN 1052107226	1052149276	-.42	113.96
10/20/98	PAYROLL	42.09S HKA/SPA	1052210585	2.80	116.76
10/20/98	COMMISSARY		1052248948	-14.00	102.76
10/27/98	PAYROLL	43.11E HKA/SPA	1052488720	10.00	112.76
10/27/98	COMMISSARY		1052523654	-39.18	73.58
10/30/98	TELEPHONE	SUMM. IN 1052626404	1052654172	-.33	73.25
11/01/98	TELEPHONE	SUMM. IN 1052706683	1052715171	-.33	72.92
11/01/98	TELEPHONE	SUMM. IN 1052706683	1052721047	-.47	72.45
11/04/98	PAYROLL	44.11W	1052766830	10.00	82.45
11/04/98	TELEPHONE	SUMM. IN 1052810673	1052855914	-.42	82.03
11/06/98	COMMISSARY		1052904870	-37.10	44.93
11/08/98	TELEPHONE	SUMM. IN 1052991770	1053023324	-.37	44.56
11/09/98	COMMISSARY		1053035745	-15.32	29.24
11/09/98	COMMISSARY		1053035557	-.60	28.64
11/09/98	TELEPHONE	SUMM. IN 1053030127	1053047829	-.38	28.26
11/10/98	PAYROLL	45.11W HKA/SPA	1053048206	14.00	42.26
11/10/98	PAYROLL	45.11E HKA/SPA	1053048236	4.20	46.46
11/10/98	TELEPHONE	SUMM. IN 1053067410	1053085830	-.49	45.97
11/11/98	TELEPHONE	SUMM. IN 1053102700	1053117353	-.33	45.64
11/11/98	TELEPHONE	SUMM. IN 1053102700	1053117614	-.38	45.26
11/12/98	TELEPHONE	SUMM. IN 1053137453	1053156263	-.49	44.77
11/13/98	TELEPHONE	SUMM. IN 1053177670	1053216834	-.49	44.28
11/14/98	TELEPHONE	SUMM. IN 1053223807	1053225291	-.49	43.79
11/16/98	TELEPHONE	SUMM. IN 1053305764	1053315536	-.34	43.45
11/16/98	PAYROLL	46.11W HKA/SPA	1053318204	19.60	63.05
11/16/98	TELEPHONE	SUMM. IN 1053305764	1053329798	-.36	62.69
11/16/98	TELEPHONE	SUMM. IN 1053305764	1053335176	-.33	62.36
11/17/98	COMMISSARY		1053348935	-12.56	49.80
11/17/98	COMMISSARY		1053349315	-3.53	46.27
11/17/98	TELEPHONE	SUMM. IN 1053342113	1053372251	-.49	45.78
11/19/98	TELEPHONE	SUMM. IN 1053410739	1053430605	-.33	45.45
11/20/98	VISIT DEPOSIT		1053461429	90.00	135.45
11/20/98	TELEPHONE	SUMM. IN 1053450805	1053489798	-.49	134.96

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The City of New York
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Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
11/22/98	TELEPHONE	SUMM. IN 1053530520	1053546496	-.49	134.47
11/23/98	COMMISSARY		1053578568	-26.48	107.99
11/23/98	COMMISSARY		1053581955	-3.24	104.75
11/23/98	TELEPHONE	SUMM. IN 1053570865	1053600228	-.42	104.33
11/24/98	PAYROLL	47.11W HKA/SPA	1053592824	19.60	123.93
11/25/98	WITHDRAWAL	OUT MAG. SUBCRIPTION	1053669174	-12.95	110.98
11/28/98	TELEPHONE	SUMM. IN 1053769821	1053770676	-.49	110.49
11/28/98	TELEPHONE	SUMM. IN 1053769821	1053805467	-.33	110.16
11/28/98	TELEPHONE	SUMM. IN 1053769821	1053805665	-.33	109.83
11/28/98	TELEPHONE	SUMM. IN 1053769821	1053806256	-.33	109.50
11/29/98	TELEPHONE	SUMM. IN 1053807563	1053819602	-.33	109.17
11/29/98	TELEPHONE	SUMM. IN 1053807563	1053821328	-.49	108.68
12/01/98	COMMISSARY		1053888507	-26.71	81.97
12/01/98	PAYROLL	48.11W HKA/SPA	1053868597	19.60	101.57
12/01/98	TELEPHONE	SUMM. IN 1053888478	1053909075	-.33	101.24
12/01/98	TELEPHONE	SUMM. IN 1053888478	1053909280	-.37	100.87
12/01/98	TELEPHONE	SUMM. IN 1053888478	1053909976	-.49	100.38
12/03/98	TELEPHONE	SUMM. IN 1053965015	1053993170	-.80	99.58
12/08/98	PAYROLL	49.08 11W HKA/SPA	1054155072	19.60	119.18
12/08/98	COMMISSARY		1054178152	-16.32	102.86
12/10/98	TELEPHONE	SUMM. IN 1054246067	1054269549	-.96	101.90
12/11/98	WITHDRAWAL	SUMMIT UNIVERSITY P.	1054298384	-52.74	49.16
12/13/98	TELEPHONE	SUMM. IN 1054370689	1054396084	-.33	48.83
12/14/98	PAYROLL	50.11W HKA/SPA	1054428013	19.60	68.43
12/14/98	TELEPHONE	SUMM. IN 1054412775	1054447112	-.96	67.47
12/15/98	COMMISSARY		1054455963	-27.02	40.45
12/19/98	TELEPHONE	SUMM. IN 1054612003	1054612525	-.96	39.49
12/19/98	TELEPHONE	SUMM. IN 1054612003	1054640889	-.60	38.89
12/19/98	TELEPHONE	SUMM. IN 1054612003	1054649731	-.96	37.93
12/20/98	TELEPHONE	SUMM. IN 1054651003	1054662600	-.33	37.60
12/20/98	TELEPHONE	SUMM. IN 1054651003	1054663959	-.49	37.11
12/20/98	TELEPHONE	SUMM. IN 1054651003	1054664583	-.60	36.51
12/22/98	PAYROLL	51.11W HKA & SPA	1054719979	19.60	56.11
12/22/98	MAIL DEPOSIT	755814MDC	1054745770	125.00	181.11
12/24/98	COMMISSARY		1054831277	-21.48	159.63
12/25/98	TELEPHONE	SUMM. IN 1054862664	1054891997	-.96	158.67
12/25/98	TELEPHONE	SUMM. IN 1054862664	1054892280	-.60	158.07
12/29/98	PAYROLL	52.11 W HKA/SPA	1055006508	19.60	177.67
12/29/98	TELEPHONE	SUMM. IN 1055017438	1055045708	-.96	176.71
01/01/99	TELEPHONE	SUMM. IN 1055143424	1055175961	-.92	175.79
01/05/99	PAYROLL	01.11W SPA & HKA	1055274764	19.60	195.39

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MDC Department of Correction
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Date	Description	Notes	Reference	Amount	Balance
01/06/99	WITHDRAWAL	COLT STUDIO	1055343988	-14.70	180.69
01/07/99	TELEPHONE	SUMM. IN 1055366209	1055381088	-.43	180.26
01/07/99	TELEPHONE	SUMM. IN 1055366209	1055397916	-.49	179.77
01/11/99	PAYROLL	02.11W HKA & SPA	1055545062	19.60	199.37
01/11/99	TELEPHONE	SUMM. IN 1055524498	1055561423	-.49	198.88
01/12/99	COMMISSARY		1055574813	-11.10	187.78
01/12/99	TELEPHONE	SUMM. IN 1055561521	1055587458	-.49	187.29
01/16/99	TELEPHONE	SUMM. IN 1055718440	1055740706	-.96	186.33
01/18/99	TELEPHONE	SUMM. IN 1055784842	1055815151	-.37	185.96
01/20/99	PAYROLL	HKA/SPA/HKA 03.11W	1055846650	19.60	205.56
01/22/99	TELEPHONE	SUMM. IN 1055945717	1055986473	-.45	205.11
01/24/99	TELEPHONE	SUMM. IN 1056028549	1056059532	-.50	204.61

Account Balance 204.09
Held Check Balance
Total Balance 204.09
Unpaid Restitution Balance

No. 98-1533

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

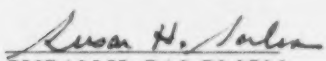
On Petition for a Writ of Certiorari
to the Court of Appeals of the State of New York

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The respondent, Angel Mateo, asks leave to file the attached Brief in Opposition to Certiorari without prepayment of costs and to proceed *in forma pauperis*. In the trial and appellate courts of New York, respondent was allowed to proceed as a poor person and was represented by the Capital Defender Office of New York. Such counsel has agreed to represent respondent in this Court without expense to him. Respondent's affidavit in support of this motion is attached hereto.

Date: New York, New York
April 21, 1999

Respectfully submitted,



SUSAN H. SALOMON
Counsel of Record

Capital Defender Office
915 Broadway
New York, New York 10010
(212) 780-5620

No. 98-1533

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss.:

I, Angel Mateo, being first duly sworn according to law, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to the redress I seek.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount (Past 12 months)**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 7	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify):_____	$ 0	$ 0	$ 0	$ 0

Total monthly income: $ Ø $ Ø $ Ø $ Ø

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes and other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None - (incarcerated)			$
			$
			$

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes and other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None (incarcerated)			$
			$
			$

4. How much cash do you and your spouse have? $ ∠ $200

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount-you	Amount- your spouse
Bank	Saving	$ 150	$ none
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value $ none

☐ Other real estate
Value $ none

☐ Motor Vehicle #1
Year, make & model none
Value $_____

☐ Motor Vehicle #2
Year, make & model none
Value $_____

☐ Other assets
Description none
Value $_____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse	**Amount owed-you**	**Amount owed-your spouse**
none	$ 0	$ 0
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	**Relationship**	**Age**
none		

8. Estimate the average monthly expenses for you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly,

quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ incarcerated	$ incarcerated
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other: _____	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments) (Specify): _____	$ 0	$ 0
Installment payments		

Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other: _____	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession or farm (attach detailed statement)	$ 0	$ 0
Other (specify): _____	$ 0	$ 0
Total monthly expenses:	$ 0	$ 0

9. Do you expect any changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including completion of this form?

☐ Yes ☑ No If yes, how much? $_____

If yes, state the attorney's name address and telephone number:

_____

_____

_____

11. Have you paid – or will you be paying – anyone other than an attorney (such as a

paralegal or a typist) any money for services in connection with this case, including completion of this form?

☐ Yes ☑ No If yes, how much? $_____

If yes, state the person's name address and telephone number:

_____

_____

_____

12. Provide any other information that will help explain why you cannot pay the costs of this case. Incarcerated and on Death Row

13. State the address of your legal residence.

Clinton Correctional Facity

Route 374, Dannemora, New York 12929

Your daytime phone number: none Your age: 29

Your years of schooling: 10 Your social-security number: 088-56-1408

I swear or affirm under penalty of perjury that the foregoing is true and correct.

Angel Mateo

ANGEL MATEO

Duly witnessed and sworn to
before me, a Notary Public,
this 14 day of January 1999

WILLIAM T. EASTON
Notary Public, State of New York
County of Monroe
Commission Expires March 5, 2000

SCREEN DISPLAY OF I.C.A.S. TRANSACTIONS
SINCE THE BEGINNING OF THE MONTH
FOR DIN NUMBER -' 99B0067 MATEO ANGEL

FACILITY	TRANS DATE	TRANSACTION DESCRIPTION	TRAN NUMBER	TRANSACTION AMOUNT
CLINTON	01/21/99	ESTABLISH THIS ACCOUNT		.00
CLINTON	01/21/99	TRANSFER FUNDS	059770	.67
CLINTON	01/22/99	RECEIPT FROM VISITOR	78701	25.00
CLINTON	01/26/99	COMMISSARY PURCHASE	000000	22.08
CLINTON	01/29/99	MAIL RECEIPT	295632	25.00
CLINTON	01/29/99	POSTAGE		2.47

CERTIFIED COPY

nc

INMATES ACCOUNTS

- CURRENT STATUS OF INMATES ACCOUNT - ANOTHER DIN ?

DIN - 99B0067 FULL NAME - MATEO ANGEL ** **

SHORT NAME - AMAT NYSIIS - 5693205H LOCATION - SH-00-047

FROM FACILITY - DATE OF ADMISSION - 01/21/99

TO FACILITY - TYPE - DATE OUT -

BUYDAY - H COMM BUYLIST AMT - INMATE SPENDABLE - 26.12

WORK RELEASE STATUS - START - TERM -

EARLIEST RELSE DTE- LIFE

* *

CURRENT BALANCE -	26.12	BALANCE FORWARD -	26.12	LAG DAYS	
WORK RELEASE -	.00	PAYROLL -	.00	0	
COMM FOR PERIOD -	.00	COMM MTD -	.00		
DISBURSEMENTS -	.00	RECEIPTS -	.00	LAG AMOUNT	
				.00	

DATE	TYPE	REASON	TOTAL	COLLECTED

CERTIFIED COPY

nc

INMATES ACCOUNTS

TOTAL AMT ADV/ENC. - 0 . 00 TOTAL ADV/ENC. COLLECTED- 0 . 00

No. 98-1533

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

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Intervenor-Petitioner.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents Michael Shane Hale and Angel Mateo respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the New York Court of Appeals in this case. That opinion is reported at 92 N.Y.2d 613 (1998).

STATEMENT OF THE CASE

On December 22, 1998, a unanimous New York Court of Appeals invalidated the guilty plea provisions of the State's death penalty statute pursuant to United States v. Jackson, 390 U.S. 570 (1968). See Hynes v. Tomei, 92 N.Y.2d 613 (1998).[1] The Court of Appeals did not strike the death penalty, but merely excised the offending provisions. Jackson thus satisfied, New York joined all other death penalty jurisdictions.

In Jackson, this Court sustained a facial attack on the Federal Kidnaping Act. The Act put a defendant at risk of death *only* if he exercised the right to a jury trial and not if he pled guilty or requested a bench trial. This statutory scheme, the Court held, unduly and "needlessly" burdened the Sixth Amendment right to a jury trial and the Fifth Amendment privilege against self-incrimination. Jackson, as the Court's subsequent recapitulations of it confirm, endorses plea-bargaining in capital cases; Jackson simply reproves capital statutory schemes that provide for different maximum penalties depending upon whether a defendant pleads guilty or exercises the right to a jury trial. Since Jackson, all death penalty jurisdictions have easily accommodated this constitutional principle, eliminating categorical sentencing-range disparities, either by statutorily allowing for the risk of death whether a defendant pleads guilty or exercises the right to trial, or, as in Arkansas, by precluding guilty pleas unless the prosecution has first waived the

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[1] The decision of the New York Court of Appeals is reproduced in Appendix A to the Petition for a Writ of Certiorari (the "Petition" or "Pet."), pages 1a - 19a.

death penalty. See Appendix to Respondents' Brief in Opposition ("Resp. App.").

In 1995, however, New York enacted a capital pleading scheme unlike any other in the United States, in derogation of Jackson's principle. As the Court of Appeals explained in its decision (Pet. at 7a), New York's death penalty statute authorizes a District Attorney to file a notice of intent to seek the death penalty against a defendant charged with first-degree murder. See N.Y. Crim. Proc. Law § 250.40 (Consol. 1999).[2] Upon conviction of first-degree murder by a jury, a capital defendant -- *i.e.*, a defendant against whom the prosecution has filed a death notice -- faces a separate sentencing proceeding before a jury to determine whether the penalty will be death or life imprisonment without parole. See id. § 400.27. As enacted, the statute also afforded the capital defendant the opportunity to escape the risk of death and ensure a maximum sentence of life-without-parole by pleading guilty, upon consent of the court and prosecutor. See id. §§ 220.10(5)(e), 220.30(3)(b)(vii).[3] In fact, the statute, which has no provision for impaneling a sentencing jury after a guilty plea (Pet. at 17a), "bars imposition of a death sentence upon a guilty plea." Id. at 4a. The Court of Appeals therefore concluded that New York -- in violation of Jackson -- "explicitly provide[d] two levels of penalty for the same offense, imposing death only on those who assert innocence and proceed to trial." Id.

Unlike the Jackson Court, however, the Court of Appeals did not strike the death penalty

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[2] By its terms, § 250.40(1) requires the filing of a death notice as a precondition to the State's seeking the death penalty. Absent a filing or if the notice is filed but then withdrawn, the State may not seek the death penalty. Further, if withdrawn, the State may not re-file the notice. § 250.40(4). In the absence of a death notice, as the Court of Appeals noted (Pet. at 18a), the maximum available punishment for first-degree murder is life-without-parole, whether the defendant pleads guilty or exercises the right to trial. See N.Y. Penal Law §§ 60.06, 70.00(5) (Consol. 1999).

[3] These provisions are set out in full at pages 2 and 3 of the Petition.

provision. Discerning a legislative intent to restore capital punishment, the Court of Appeals decided that excising the capital pleading provisions would sustain that goal yet eliminate the burden on constitutional rights prohibited by Jackson, "since without these provisions there is only one maximum penalty for [death-noticed] first degree murder." Id. at 16a-17a. With this action, the Court of Appeals explained, "a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending." Id. at 17a. Where, however, no such notice is pending, guilty pleas to first-degree murder are permitted, because defendants in that situation face the same maximum sentence -- life-without-parole -- regardless of how guilt is determined. See id. at 18a. The Court of Appeals also determined that guilty pleas to other lesser offenses, such as second-degree murder, are not prohibited in any circumstances, as Jackson did not bar "imposing different penalties for different crimes." Id.[4]

Petitioners now ask this Court to take the extraordinary step of overruling its precedent. Petitioners, however, present no reason to revisit, much less overrule, Jackson. Petitioners misstate its significance as constituting an "anti-plea bargaining holding." Id. at 16. In fact,

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[4] On January 27, 1999, Chief Judge Kaye, of the Court of Appeals, denied petitioners District Attorneys' applications for a stay of the judgment. The Attorney General of the State of New York, Intervenor in the state proceedings, had filed an affirmation taking "no position" on the stay applications. Affirmation of Attorney General dated January 25, 1999. On February 24, 1999, the Honorable Ruth Bader Ginsburg, Associate Justice of this Court and Circuit Justice for the Second Circuit, denied petitioners District Attorneys' application to stay the mandate of the New York Court of Appeals. The Attorney General of the State of New York did not participate in that stay application.

On March 29, 1999, Justice Albert Tomei, one of the two respondents in Hynes v. Tomei, informed this Court that "[i]t was only through a procedural peculiarity of New York law that [he] became a party to this matter in the first instance"; that he takes "no position on the petition"; and that he does not intend to participate in the case should certiorari be granted. The other respondent, Hale, as petitioners noted (Pet. at 9), pleaded guilty to second-degree murder following the Court of Appeals's decision.

Jackson endorses plea-bargaining. Its true holding -- that the risk of execution cannot be the statutory price of exercising Fifth and Sixth Amendment rights -- constitutes a vital but discrete doctrine in capital jurisprudence, whose narrow import has been well understood by all other capital jurisdictions and now by New York.

REASONS WHY THE PETITION SHOULD BE DENIED

After Hynes v. Tomei, 92 N.Y.2d 613 (1998), no government now "reserve[s] the maximum punishment . . . for those who insist on a jury trial." Corbitt v. New Jersey, 439 U.S. 212, 217 (1978). In the face of this now-nationwide conformity in death penalty schemes -- and with no indication that compliance with Jackson's narrow rule has impeded either the functioning of capital punishment or plea-bargaining in capital cases -- petitioners nevertheless insist that Jackson must be "formally overruled or expressly limited." Pet. at 11. Petitioners' arguments mischaracterize Jackson and otherwise manufacture "open questions," conflict and confusion where none exist. They present no occasion for the Court to depart from *stare decisis*. The Petition, therefore, should be denied.

A. Jackson Endorses Ordinary Plea-Bargaining, Including in Capital Cases.

Petitioners primarily argue that Jackson is "fundamentally irreconcilable" with the Court's subsequent decisions that have "established the propriety of discretionary plea negotiations with capital defendants . . . ." Pet. at 11. According to petitioners,

> the Court in *Jackson* indicated that it was constitutionally impermissible to offer a capital defendant a reduced sentence in exchange for his or her guilty plea, because the "inevitable" result would be to discourage that defendant from exercising the constitutional right to trial and to remain silent.

Pet. at 12. Petitioners' reading of Jackson is selectively incomplete and wrong. Jackson neither

held nor "indicate[d]" that capital plea-bargaining offends the Constitution. Rather, it proscribed legislative schemes that reserve the risk of death exclusively for those who exercise the right to a jury trial.

In Jackson, the Court lauded the Government's proffered justification that the statute sought to limit the death penalty to instances where juries recommend it. But that legitimate goal, the Court found, could be achieved without penalizing those defendants who demand a jury trial. For example, the Court observed, the choice between imprisonment and execution could always be left to the jury, "regardless of how defendant's guilt has been determined." 390 U.S. at 581-82. Because of "this and other alternatives," the Court held that the Act's death penalty provision "needlessly" penalized the assertion of a constitutional right, id. at 583, and struck it down.

The Court further explained that its facial invalidation of the statute did not jeopardize guilty pleas previously entered under it because "the fact that the . . . Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." Id. at 583.[5] The Court also made plain that the constitutional problem did not inhere in the ordinary practice of individualized plea-bargaining. Rather, the Court held that a legislative scheme that, without regard to the facts, *a priori* reserves the risk of execution for persons who plead not

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[5] The Court thus foresaw and took pains to forestall claims such as those later advanced by the defendant in Brady v. United States, 397 U.S. 742 (1970). In Brady, the Court dealt with the same statutory scheme as that contested in Jackson. Unlike Jackson, however, Brady had not challenged the statutory scheme pretrial but had entered a guilty plea, a plea that the Court refused to deem involuntary by an extension of Jackson. See id. at 746, 748. Stating that Jackson did not mandate a new test for the validity of guilty pleas, see id. at 747, Brady holds that guilty pleas entered to avoid the possibility of the death penalty are not thereby involuntary. Id. at 748, 754; accord Parker v. North Carolina, 397 U.S. 790, 794-95 (1970).

guilty exerts an "unnecessary and therefore excessive" chill upon the right to contest guilt, id. at 582, and that such persons "cannot [constitutionally] be put to death under its authority." Id. at 591.

Contrary to petitioners' characterization, Jackson thus did not disapprove ordinary capital plea-bargaining. Rather, Jackson treated *categorical legislative schemes* as altogether different in nature and consequences from ordinary *individualized* plea-bargaining, even in capital cases. In fact, the Court took care to *approve* statutory schemes under which capital guilty pleas could be accepted (such as those of Washington and California, see 390 U.S. at 582 & n.23), and held constitutional guilty pleas entered with the purpose and effect of avoiding a death sentence. See id. at 583.[6]

Thus, cases such as Chaffin v. Stynchcombe, 412 U.S. 17 (1973), and Bordenkircher v. Hayes, 434 U.S. 357 (1978), which endorse plea-bargaining, do not, as petitioners would have it, represent a "fundamental shift away from *Jackson*. . . ." Pet. at 13. These cases recognize the "give and take" of true plea-bargaining, which flows "from the mutuality of advantage to

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[6] Indeed, the Court, in its strongest terms, defended capital plea-bargaining in rejecting the Government's effort to save the Federal Kidnaping Act by reading it to forbid all guilty pleas. See id. at 584. In declining the Government's invitation absent an "unambiguous expression" of approval from Congress, id. at 585, the Court said of plea-bargaining: "But of course the inevitable consequence of this 'solution' would be to force all defendants to submit to trial, however clear their guilt and however strong their desire to acknowledge it in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings. . . . Quite apart from the cruel impact of such requirement upon those defendants who would greatly prefer not to contest their guilt, it is clear -- as even the Government recognizes -- that the automatic rejection of all guilty pleas would rob the criminal process of much of its flexibility." Id. at 584 (internal quotation marks omitted). At page 95 of his brief to the New York Court of Appeals, the Kings County District Attorney quoted this very passage as support for his assertion that the negotiated guilty plea "has desirable practical and policy effects." For this reason as well, petitioners' assertions in this Court that Jackson was "anti-plea bargaining" (Pet. at 16) must be rejected.

defendants and prosecutors, each with his own reasons for wanting to avoid a trial." Bordenkircher, 434 U.S. at 363 (citations and internal quotations omitted). True plea-bargaining contemplates, as a necessary element, that a defendant will be faced with the difficult choice whether to risk a more severe punishment by pleading not guilty. See id. at 364. These cases further recognize that Jackson neither involved nor reproved true plea-bargaining; instead of "give and take," the statutory scheme at issue in Jackson invariably linked a higher penalty to exercise of the right to a jury trial, without regard to the facts of an individual defendant's case.[7] This, the Chaffin Court observed, was unconstitutional. 412 U.S. at 30 (Jackson's "sentencing structure" was struck down for chilling the exercise of basic constitutional rights). Indeed, the Court declared, "Jackson [is] clear and subsequent cases have not dulled [its] force: if the only objective of a state practice is to discourage the assertion of constitutional rights, it is 'patently unconstitutional.'" Id. at 33 n.20 (citation omitted); see also Bordenkircher, 434 U.S. at 363 (citing Jackson for principle that it is unconstitutional to "penalize a person's reliance on his legal rights").

Petitioners' misreading of Jackson is further confirmed by Corbitt v. New Jersey, 439 U.S. 212 -- which petitioners attempt but fail to turn to their benefit (Pet. at 14). There, the Court sustained a statutory scheme against a Jackson challenge because a defendant risked the *same* top sentence (albeit life imprisonment, not death) whether he pleaded guilty or went to trial. The

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[7] As one commentator has put it, the statute struck down by Jackson could not be sustained as reflecting ordinary plea-bargaining because "it could not be justified as a reflection of litigation uncertainties, since it applied to all defendants. . . . The state is [thus] forbidden to induce pleas by increasing . . . the sentence to be expected upon conviction [] to inappropriately high levels, . . . by a legislatively-designed penalty structure (as in Jackson)." Richard Adelstein, *The Negotiated Guilty Plea: A Framework For Analysis*, 53 N.Y.U. L. Rev. 783, 824, 827 (1978).

state did "not reserve the maximum punishment for murder for those who insist on a jury trial." Id. at 217. Since the prosecutor could offer a more beneficent plea, depending upon the vagaries of "'infinite variables peculiar to each individual [case],'" the Court, using the Jackson framework, concluded that, unlike in Jackson, it "'simply cannot be said that a state has [by statute] invidiously classified.'" Id. at 225-26 (quoting North Carolina v. Pearce, 395 U.S. 711, 722 (1969)). Petitioners' claim that Corbitt "was utterly irreconcilable with *Jackson*" (Pet. at 14) therefore collapses, given Corbitt's statutory scheme making the *same maximum* sentence available for the same crime, without regard to how defendant's guilt was adjudicated -- something petitioners fail even to mention.

This Court's other recapitulations of Jackson (also omitted by petitioners) reinforce its continuing vitality: It is the *sentencing scheme*, with its undue *legislative* burden on the accused's exercise of the constitutional rights to trial by jury and to plead not guilty, that is prohibited. Thus, in Ludwig v. Massachusetts, 427 U.S. 618, 627 n.4 (1976), the Court rebuffed the defendant's Jackson-based challenge to Massachusetts's two-tiered trial system because, in contrast to the statutory penalty structure in Jackson, "the same range of penalties [was] available at both tiers." And in Zant v. Stephens, 462 U.S. 862, 885 (1983), the Court again referred to Jackson as safeguarding the "request for trial by jury" -- a request that is "constitutionally protected."[8]

Ultimately, petitioners cannot demonstrate that this Court has cast doubt on Jackson's

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[8] See also Lockett v. Ohio, 438 U.S. 586, 634-36 (1978) (Rehnquist, J., concurring in part and dissenting in part) (rejecting a Jackson claim addressed to the Ohio death penalty statute -- a claim not addressed by the majority, which reversed on other grounds -- because, unlike the defendant in Jackson, who could have been executed only if he exercised his right to a jury trial, in "Ohio, a defendant is subject to possible execution whether or not he pleads guilty").

principle or that honoring Jackson's principle has impeded plea-bargaining in any death penalty jurisdictions in the country -- all of which have accommodated Jackson. Petitioners cannot do so because all of these other jurisdictions preserve the prosecutor's power to withhold or extend mercy to the capital defendant without legislatively differentiating the top sentence for the identical crime depending upon whether the defendant pleads guilty or exercises the right to trial. For in all these other jurisdictions, while the capital defendant may plead "open" (without a sentence guarantee) or go to trial and perhaps escape a death sentence, the prosecutor can still bargain with a capital defendant by offering a sentence less than death in exchange for a guilty plea. Put in Jackson's terms, legislative schemes that would reserve the maximum penalty for those who exercise the right to a jury trial are thus "needless" because they do not reflect individualized prosecutorial discretion and plea-bargaining and are not necessary to promote it. Plea-bargaining, then, simply does not raise issues that would require this Court to revisit or overrule Jackson.

B. Neither Jackson Nor the New York Court of Appeals's Application of It Raises Any Open Questions.

Petitioners next maintain that Jackson, specifically at 390 U.S. at 573, 578-81, "expressly left open" the question whether a "bifurcated capital statute, under which a capital defendant may exercise his or her right to a jury trial on the issue of guilt and still negotiate a plea if convicted, avoids the *Jackson* problem." Pet. at 16. Jackson, however, did no such thing.

Rather, at the pages cited by petitioners, the Jackson Court noted that the Government, in trying to "rescu[e] [the] statute from a charge of unconstitutionality," 390 U.S. at 580, had argued that a defendant could not avoid the risk of death by pleading guilty, claiming -- as an alternative to its argument that the statute could be read to prohibit all guilty pleas, see *ante* at 6

n.6 -- that the statute authorized the judge to convene a sentencing jury *after accepting a plea of guilty*. According to the Government, "Congress' failure to provide for the infliction of the death penalty upon those who plead guilty or waive jury trial was no more than an oversight that the courts can and should correct." Id. at 578. This Court rejected the Government's interpretation of the Federal Kidnaping Act and concluded that it was unnecessary to determine whether such a statutory scheme would be constitutional. See id. at 572-73, 579. The Court nonetheless cast constitutional doubt on the plea-sentencing scheme that the Government envisioned, noting that the trial judge would have to "take the extraordinary step" and "make[] an affirmative decision" to convene a penalty-phase jury after accepting a guilty plea; still, therefore, only a defendant who went to trial would "automatically" risk execution. Id. at 573 n.6.

The only other question even arguably left open was whether an "automatic" bifurcated *plea* and sentence system would be constitutional. This "open" question -- whose answer was strongly suggested by the Jackson Court's endorsement of such schemes then-extant in Washington and California, see 390 U.S. at 582 & n.23 -- has since been effectively answered in the affirmative by Corbitt v. New Jersey, 439 U.S. at 217 (no Jackson violation where same maximum punishment available regardless of how guilt is determined), and by the overwhelming majority of death penalty jurisdictions that have adopted such schemes. See, e.g., State v. Mann, 959 S.W.2d 503, 511 (Tenn. 1997) ("Unlike the statute at issue in Jackson, Tennessee law does not reserve the maximum punishment for murder for those who insist on a jury trial. Indeed, under Tennessee law, the State is free to seek the death penalty following entry of a guilty plea."), cert. denied, 118 S. Ct. 2376 (1998).[9] Indeed, petitioners acknowledge the

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[9] Under such statutory schemes, a defendant may also attempt to secure a discretionary (continued...)

constitutionality of such schemes. Pet. at 17-18 (providing "defendants the right to plead guilty and receive a death sentence, as well as a non-death sentence," is "solution" to Jackson "problem").

As for the "open" question that petitioners raise -- which they also recast as the "solution" New York had "adopted" for the Jackson "problem" (Pet. at 17-18) -- it is answered by Jackson itself, as the New York Court of Appeals (Pet. at 13a) observed:

> [The possibility of agreement on sentence following the guilt-phase] does not alleviate the *Jackson* problem, however, because bifurcation does not eliminate the statutory framework that allows the possibility of death only after a jury trial. Capital defendants under the New York statute who are awaiting trial and are offered a plea are still faced with the choice *Jackson* declared unconstitutional. . . .

Petitioners also hint that a bifurcated sentencing proceeding -- following a jury trial on guilt -- "[with] provision for consideration of mitigating and aggravating factors" is itself a "solution" to, or another "open question" surrounding, Jackson. Pet. at 17. Again, Jackson refutes the claim. To be sure, a capital defendant who proceeds to a jury trial may present mitigating evidence, which in some cases could reduce risk of a death verdict. But such a scheme nonetheless violates the Fifth and Sixth Amendments where only such a defendant faces the risk of a death sentence. See Jackson, 390 U.S. at 581 ("[T]he defendant who abandon[ed] the right to contest his guilt before a jury [was] assured that he [could not] be executed; the

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[9](...continued)
plea for a lesser sentence. They thus codify true plea-bargaining. Such schemes comport with Jackson because, absent a beneficial plea, the defendant equally risks a death sentence whether he pleads guilty or goes to trial. Contrary to petitioners' unelaborated description of it as a "'suicide' plea" (Pet. at 19), a capital defendant's guilty plea without the promise of a sentence other than death is no such thing. First, mandatory death sentences are unconstitutional. See, e.g., Sumner v. Shuman, 483 U.S. 66 (1987). And, in fact, such a guilty plea can constitute a powerful form of mitigation, evincing the accused's full acceptance of responsibility for his crime. Only a capital defendant's refusal to present any mitigation, or actual insistence on receiving the death penalty, can be characterized as an attempt at "judicial suicide."

defendant ingenuous enough to seek a jury acquittal [stood] forewarned that, if the jury [found] him guilty and [did] not wish to spare his life, he [would] die.").

In addition, petitioners maintain that Jackson's concerns are "satisfied" by a statutory requirement of prosecutorial consent for a guilty plea to first-degree murder and nondeath disposition -- a requirement that New York also had "adopted." Pet. at 17-18. Petitioners' legal pronouncement (or suggestion of another "open question") is unaccompanied by legal authority and flatly incorrect. Petitioners neglect to mention that the defendant in Jackson had no absolute right to plead guilty; in fact, under the Federal Kidnaping Act, a judge could have refused an improvident plea. 390 U.S. at 583. This Court explicitly noted that the power to reject guilty pleas "might alleviate, but [could not] totally eliminate, the constitutional infirmity in the capital punishment provision" at issue there. Id. Petitioners also fail to mention that the Court subsequently found North Carolina's capital pleading scheme, a scheme that had required the approval of both the trial judge and prosecutor for a defendant to plead guilty and avoid a death sentence, see Parker, 397 U.S. at 792 n.2, unconstitutional under Jackson. See Roseboro v. North Carolina, 403 U.S. 948 (1971).

What the Court has consistently recognized, of course, is that the constitutional infirmity of a Jackson-violative scheme is the same for any defendant: Whether the defendant is offered a guilty plea, whether the defendant's offer to plead guilty is rejected, or whether the defendant's lack of interest in a plea leaves the subject unbroached, the statutory scheme is impermissible because it allows a categorical disparity in maximum punishment for the very same offense depending on whether the defendant exercises or foregoes the right to a jury trial.

C. The New York Court of Appeals's Decision Has Created Nationwide Conformity In Honoring Jackson's Enduring Principle.

Finally, petitioners argue that the Court of Appeals's chosen remedy "cannot be what *Jackson* sought to promote," and that its decision manifests "serious confusion" and compounds "inconsistent results throughout the country." Pet. at 19-23. In fact, Jackson did not dictate any one particular remedy. And the one effected by the Court of Appeals was well within Jackson's contemplation.

Upon concluding that Congress could not impose the death penalty "in a manner that needlessly penalizes the assertion of a constitutional right," the Jackson Court struck the clause of the Federal Kidnaping Act that authorized the death penalty. 390 U.S. at 583-85, 591. The Court recognized, however, other possible remedies. Aside from allowing for the risk of death "regardless of how defendant's guilt has been determined," id. at 581-82, another constitutional cure, as the Government had suggested, was requiring that all capital cases proceed to a jury trial, for that, too, would eliminate the sentence disparity. See id. at 584. As noted *ante* at 6 n.6, the Jackson Court rejected that option because of the lack of express congressional intent and consequent reluctance to engage in "judicial reconstruction."

Here, in severing the capital guilty plea provisions but retaining the death penalty, the Court of Appeals also sought to accommodate legislative intent and eschew judicial rewriting. Even though almost all death penalty jurisdictions have obviated or remedied the Jackson problem by providing for the possibility of a death sentence upon a guilty plea, the Court of Appeals recognized that currently no statutory mechanism exists in New York for a jury to sentence a defendant following a guilty plea (Pet. at 17a) and declined to create one, just as the Jackson Court had declined to read such a provision into the Federal Kidnaping Act. 390 U.S. at

580.[10]

New York's resultant statutory scheme now precludes a defendant's pleading guilty to first-degree murder once the prosecution has filed -- and refuses to withdraw -- notice of intent to seek the death penalty, N.Y. Crim. Proc. Law § 250.40(1) (Consol. 1999). With this solution -- whose propriety the Jackson Court recognized -- the Court of Appeals has insured that the maximum punishment, death, is not reserved only for those who insist on a jury trial as opposed to those who plead guilty to the very same crime, *i.e.*, death-noticed murder. If, however, the prosecution has withheld or withdrawn death notice, plea-bargaining with respect to first-degree murder remains unaffected, because life-without-parole stands as the same top sentence for the crime of "non-death-noticed" murder, regardless of how guilt is determined. Plea-bargaining to lesser offenses not punishable by death remains unaffected, since the maximum penalty structure for them will not hinge on how guilt is determined.[11]

The Court of Appeals's ruling not only conforms to Jackson, but accords with Jackson's progeny. In fact, petitioners cannot point to a single capital jurisdiction that fails to comply with

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[10] The New York Legislature is free, of course, to create a statutory mechanism for jury sentencing, including the possibility of a death sentence, following a guilty plea to capital murder.

[11] Petitioners' examples of potential plea-bargains and sentences for first- and second-degree murder are confusing and do not, in any case, advance the constitutional inquiry. Pet. at 19. A nondeath disposition for a single count of first-degree murder ranges from 20 to life to life-without-parole. See N.Y. Penal Law §§ 60.06, 70.00(3)(a), (5) (Consol. 1999). An authorized disposition for a single count of second-degree murder ranges from 15 years to life imprisonment to 25 years to life imprisonment. See id. § 70.00(3)(a). Whether multiple counts of either crime may be sentenced consecutively is a separate matter of state law. See id. § 70.25(2). The constitutional point, however, is that where the prosecution is seeking the death penalty, and thus has filed death notice pursuant to N.Y. Crim. Proc. Law § 250.40(1) & (2) (Consol. 1999), the authorized maximum penalty for first-degree murder is death, which, before the Court of Appeals's decision, was statutorily available only upon conviction after trial and precluded upon conviction by a guilty plea.

Jackson. There are none. See Resp. App. Rather than acknowledge this, petitioners cite State v. Mann, 959 S.W.2d 503, but fail to note that the Tennessee Supreme Court rebuffed a Jackson challenge there because the challenged statute allowed the prosecution to seek the death penalty after a guilty plea. Id. At 511. Petitioners' incomplete discussion of Conger v. Warden, 510 P.2d 1359 (Nev. 1973), similarly misleads, for Nevada likewise permits "open" pleas in capital cases, with a judicial panel deciding on sentence. See Nev. Rev. Stat. §175.552(1)(b) (1997). Consequently, as Conger put it, "[t]here [is] no disparity in the power to punish." 510 P.2d at 1361. And, petitioners refer to Louisiana law but ignore the Louisiana capital defendant's unqualified right to plead guilty and face a capital sentencing jury. See La. Code Crim. Proc. Ann. art. 557(A), 905.3 (West 1997).[12]

Finally, as for Arkansas, while its death penalty statute forbids a guilty plea with death as a possible sentence, it requires that the prosecutor "waive[] the death penalty" as a predicate for a guilty plea; otherwise, the capital defendant "may [not] waive trial by jury." Ark. Code Ann. §§ 5-4-608(a-b), 16-89-108(a-c) (Michie 1997); Ark. Code Ann., R. Crim. Proc. 31.4 (Michie 1993). Arkansas's high court echoed the unqualified requirement of the prosecutor's waiver in sustaining the statute against a Jackson challenge: "the prosecutor must waive the death penalty with the permission of the court before the defendant may waive either trial by jury on the issue of guilt or his right to have sentence determined by a jury." Ruiz v. State, 630 S.W.2d 44, 47 (Ark.), cert. denied, 459 U.S. 882 (1982). This statutory scheme thus eliminates any maximum-

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[12] Petitioners cite State v. Jett, 419 So.2d 844 (La. 1982), as upholding the constitutionality of a capital pleading scheme similar to New York's. Pet. at 20. Contrary to petitioners' suggestion, Jett did not involve a Jackson challenge to the statutory scheme; Jackson is not even mentioned in the decision. In any case, Louisiana's current scheme, different from the one at issue in Jett, complies with Jackson.

sentence disparity by requiring that all death-noticed cases proceed to trial. It assures that, if the prosecutor revokes the death notice, the defendant is no longer subject to the death penalty whether he pleads guilty or goes to trial; instead, he is subject to the same top sentence of life imprisonment.

Petitioners call such a scheme "strained and sophistic." Pet. at 22. Jackson deems it neither. See Jackson, 390 U.S. at 584-85 (requiring all death-noticed defendants to have a jury trial and thus eliminating guilty pleas is, while perhaps "cruel," a constitutional, legislative option). In the next breath, petitioners contend that New York's stricken plea provisions "precisely" matched Arkansas's scheme because all the Arkansas "provision does is provide for a system by which, in a capital case, the prosecution would, instead of seeking the death penalty, consent to a non-death disposition in return for the defendant's guilty plea." Pet. at 22. The comparison, however, mischaracterizes New York's former scheme. Of course, if the State does not seek the death penalty -- *i.e.*, never files death notice or withdraws it pursuant to N.Y. Crim. Proc. Law § 250.40 (Consol. 1999) -- the top sentence for first-degree murder is life-without-parole, whether the defendant pleads guilty or not. But where the State has filed a death notice, and so is "seeking the death penalty," New York's provisions were, as the Court of Appeals correctly recognized, unconstitutional precisely because the defendant risked execution only upon a jury verdict convicting him of first-degree murder but not upon a guilty plea to the identical crime.

In short, Hynes v. Tomei reflects no confusion, and there is no inconsistency around the country.

D. There Are No Remaining Reasons To Reexamine Jackson.

Petitioners' overarching argument that Jackson is ripe for overruling lacks foundation. This Court brings the utmost caution to reconsideration of its decisions. *Stare decisis* "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991). Thus, *stare decisis* yields only where a prior decision's underpinnings have been eroded by subsequent decisions of the Court, see United States v. Gaudin, 515 U.S. 506, 520 (1995), or where the prior decision has splintered the Court and has "baffled and divided the lower courts that have considered it," Nichols v. United States, 511 U.S. 738, 743-46 (1994); see also Payne, 501 U.S. at 829-30 (observing that lower courts had differed in interpreting the opinions and footnotes in the overruled decisions); cf. Mitchell v. United States, __ U.S. __ (1999), No. 97-7541, 1999 WL 181164, at *14 (U.S. April 5, 1999) (Scalia, J., dissenting) (*stare decisis* does not yield merely to correct a "wrong turn").

These jurisprudential concerns are absent here. Since Jackson, the Court has neither held nor hinted that it is constitutionally acceptable for a crime to have a higher, legislated maximum punishment where the accused exercises his right to a jury trial. Since Jackson, lower courts have understood the decision's import. That understanding continues unabated. See, e.g., United States v. Lott, 156 F.3d 1240 (9th Cir. 1998) (unpublished table decision) *available in* No. 97-30339, 1998 WL 482975, at *1 (Aug. 12, 1998) ("Unlike the statute at issue in United States v. Jackson, . . . 21 U.S.C. § 841(b)(1)(A) does not *by its terms* penalize a defendant's choice to exercise the Sixth Amendment right to a jury trial. The enhancement applies regardless whether the defendant pleads guilty or is found guilty of a crime by a jury, so long as the

defendant has a proven prior conviction.") (emphasis added); Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir. 1998) (observing that Jackson does not preclude guilty pleas entered to avoid the possibility of the death penalty).

CONCLUSION

For the foregoing reasons, respondents Hale and Mateo respectfully submit that the Petition for a Writ of Certiorari to the New York Court of Appeals should be denied.

Respectfully submitted,

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Appendix

Federal Procedure: 18 U.S.C. § 3593 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's motion and with approval of the government, before the court).

Alabama: Ala. Code § 13A-5-42, 43, 45 (1998) (a defendant may plead guilty to a capital crime; the state still must prove the defendant's guilt to a jury; upon conviction, the defendant may be sentenced to death if so determined in a hearing held before a jury or the court).

Arizona: Ariz. Rev. Stat. § 13-703(B) (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Arkansas: Ark. Code Ann. §§ 5-4-608, 16-89-108 (Michie 1997); Ark. Code Ann., R. Crim. Proc. 31.4 (Michie 1993) (no defendant charged with a capital crime may waive either trial by jury on the issue of guilt or sentence if the prosecution seeks a sentence of death; in those cases where the court permits the prosecution to waive the death penalty, the defendant may thereafter plead guilty, or proceed with a jury trial or bench trial with a possible penalty of life without parole).

California: Cal. Penal Code § 190.4 (West 1998) (upon a plea of guilty to a capital crime, a jury, or the court if both sides agree to waive a jury, determines whether a special circumstance exists warranting a penalty of death; if the trier of fact finds a special circumstance, a hearing shall be held to determine whether the penalty of death should be imposed).

Colorado: Colo. Rev. Stat. § 16-11-103 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death in a separate sentencing hearing held before a three-judge panel).

Connecticut: Conn. Gen. Stat. § 53a-46a (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's motion and with approval of the court and consent of the state, before the court).

Delaware: Del. Code Ann. tit. 11, § 4209 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's and the state's waiver, before the

court).

Florida: Fla. Stat. Ann. § 921.141 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, on the defendant's waiver, before the court).

Georgia: Ga. Code Ann. § 17-10-32 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death by the court if the court finds the existence of at least one statutory aggravating circumstance, except in cases of treason and aircraft hijacking, in which no aggravating circumstance is required).

Idaho: Idaho Code § 19-2515 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Illinois: 720 Ill. Comp. Stat. Ann. 5/9-1 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if the state requests a determination as to whether death is an appropriate penalty, and it is so determined in a hearing held before a jury or, upon the defendant's waiver, before the court).

Indiana: Ind. Code Ann. § 35-50-2-9 (West 1988) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Kansas: Kan. Stat. Ann. § 21-4624 (1997) (upon conviction of a capital offense, including a judgment of guilt entered upon a plea of guilty, Kan. Stat. Ann. § 21-3110(4) (1997), the court, upon motion of the county or district attorney, shall conduct a sentencing proceeding to determine whether the defendant shall be sentenced to death).

Kentucky: Ky. Rev. Stat. Ann. § 532.025 (Michie 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's and the state's waiver, before the court). *See* Commonwealth v. Johnson, 910 S.W.2d 229 (Ky. 1995).

Louisiana: La. Code Stat. Crim. Proc. Ann. art. 557, 905 (West 1997) (a defendant may plead guilty in a capital case, with the consent of the court and state, provided that, if the state pursues a sentence of death, the court shall impanel a jury for the purpose of conducting a hearing to determine the issue of penalty).

Maryland: Md. Ann. Code art. 27, § 413 (1998) (a defendant who pleads guilty to a

capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's waiver, before the court).

Mississippi: Miss. Code Ann. § 99-19-101 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the written agreement of the defendant and the state, before the court).

Missouri: Mo. Ann. Stat. §§ 565.006, 565.030 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court or, if agreed to by the state, before a jury).

Montana: Mont. Code Ann. § 46-18-301 (1997) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Nebraska: Neb. Rev. Stat. § 29-2520 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court that accepted the plea or a three-judge panel).

Nevada: Nev. Rev. Stat. § 175.552 (1997) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a three-judge panel).

New Hampshire: N.H. Rev. Stat. Ann. § 630:5 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury).

New Jersey: N.J. Stat. Ann. § 2C:11-3 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's motion and consent of the prosecuting attorney, before the court).

New Mexico: N.M. Stat. Ann. §§ 31-18-14; 31-20A-1(B) (Michie 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court or, upon demand of either party, before a jury).

North Carolina: N.C. Gen. Stat. § 15A-2000 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury).

Ohio: Ohio Rev. Code Ann. § 2929.02 (West 1998); Ohio R. Crim. Proc. 11 (West 1999) (a defendant charged with a capital offense may plead guilty, addressing separately each charge and capital specification; if the pleas are

accepted, a three-judge court shall conduct a hearing to determine whether the defendant committed a capital offense; if so, the panel shall conduct a hearing to determine whether the defendant should be sentenced to death).

Oklahoma: Okla. Stat. Ann. tit. 21, § 701.10 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Oregon: Or. Rev. Stat. § 163.150 (1997) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury).

Pennsylvania: 42 Pa. Cons. Stat. Ann. § 9711(b) (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's waiver and consent of the Commonwealth, before the court).

South Carolina: S.C. Code Ann. § 16-3-20 (Law. Co-op. 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

South Dakota: S.D. Codified Laws §§ 23A-27A-2, 23A-27A-6 (Michie 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Tennessee: Tenn. R. Crim. Proc. 11(4) (1998); Tenn. Code Ann. § 39-13-205(b), (c) (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's waiver, before the court).

Texas: Tex. Crim. P. Code Ann. arts. 1.13, 26.14 (West 1997); Tex. Penal Code Ann. § 12.31 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury).

Utah: Utah Code Ann. § 76-3-207 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury, or upon the defendant's request and with approval of the court and consent of the prosecution, before the court).

Virginia: Va. Code Ann. §§ 19.2-257, 19.2-264.4 (Michie 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Washington: Wash. Rev. Code Ann. § 10.95.050 (West 1998) (a defendant who pleads

guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury).

Wyoming: Wyo. Stat. Ann. § 6-2-102 (Michie 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).